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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 280.

THE LONDON ASSURANCE, APPELLANT,

vs.

COMPANHIA DE MOAGENS DO BARREIRO.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FILED MAY 25, 1895.

CERTIORARI AND RETURN FILED MAY 19, 1896.

(15,917.)

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IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 8 of 1892.

IN ADMIRALTY.

COMPANHIA DE MOAGENS DO BARREIRO

vs.

THE LONDON ASSURANCE.

Pleas before the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania.

It is thus contained:

Be it remembered, that on the eighth day of February, A. D. 1892, Curtis Tilton, Esq., and John F. Lewis, Esq., Proctors of said Court, come into the said Court and exhibit the libel and complaint of Companhia de Moagens do Barreiro against "The London Assurance" in a cause of marine insurance, civil and maritime, which, being read and filed, is in the words and figures following, to wit:

To the Honorable William Butler, Judge of the District Court of the United States in and for the Eastern District of Pennsylvania:

The libel of Companhia de Moagens do Barreiro, of Lisbon, Portugal, against The London Assurance, an incorporation created by royal charter in the Kingdom of Great

Britain, and having an agency and transacting business in the City of Philadelphia, in a cause of marine insurance, a contract civil and maritime, alleges as follows:

First.—That Lawrence Johnson & Company in December, 1890, for and at the request of libellants, shipped on board the steamer *Liscard*, at New York, bound for Lisbon, Portugal, thirty-three thousand (33,000) bushels of wheat, valued at forty thousand eight hundred and eighty-seven ($40,887) dollars, and for and at the expense and request of libellants insured the said wheat in "The London Assurance" for said voyage in the sum of twenty thousand ($20,000) dollars in gold, and thereupon on December 10, 1890, the said "The London Assurance" issued its certificate to Lawrence Johnson & Company, No. 546, certifying that said corporation insured under policy No. 427 (made for
on account of whom it may concern) for Lawrence Johnson & Company twenty thousand ($20,000) dollars in gold on 33,000 bushels of wheat in bulk, in bin one, 3,000 bushels and in bins three and four 30,000 bushels, free of particular average, unless the vessel be sunk, burned, stranded, or in collision, valued at $40,887, shipped on board of the steamer *Liscard*, at and from New York to Lisbon, Portugal.

That said certificate was issued at Philadelphia by the Philadelphia agency of the said corporation, and contained the following agreement: "It is hereby understood and "agreed that in case of loss such loss is payable to the order "of Lawrence Johnson & Company. * * * This certi- "ficate represents and takes the place of the policy, and con- "veys all the rights of the original policy holder for the "purpose of collecting any loss or claim as fully as if the "property was covered by a special policy directed to the "holders of this certificate." That said certificate was signed and issued by Brockie & Welsh, the Philadelphia agents of said corporation.

Second.—That Lawrence Johnson & Company endorsed, transferred and delivered to the libellants the bills of lading,

and the said certificate of insurance issued as aforesaid by The London Assurance, and the libellants are now the owners and holders of the same, whereby and by reason of said insurance having been effected at libellants' expense and for their benefit, the said corporation became bound to pay the libellants all losses sustained by them by reason of the loss or damage of the said wheat from the perils enumerated in said policy, and which the said corporation agreed by the terms of said policy to assume. That among the perils which the said assurers agreed to "bear and take upon themselves," were those of the seas, barratry of the master and mariners and all other peril, loss and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof.

Third.—That on the night of the twelfth of December, 1890, after said cargo was loaded and said insurance made, the steamer *Liscard* came into collision with a lighter in tow of a tug, breaking in the bulwark of said steamer *Liscard*, bending her stanchions and starting her main rail. The break was in her port side, eleven feet long, and open from one half inch to one and a half inches; it was irregular in shape, extending fore and aft, and in its lowest place was a few inches above the deck in the enclosed iron side of said steamer; that upon said voyage the said steamer encountered high waves and storms and suffered further damage, and opened her deck seams, and in consequence thereof she was obliged to return in distress to the port of Boston. That by the perils of the sea aforesaid, which said ship encountered upon said voyage, and after said cargo was loaded, and by the straining and opening of her deck-seams in the storms aforesaid, and the shipping of water through said collision, break and over the rail during the continuance of said storm for a period of eight days, which leaked through the strained and opened seams of her deck upon her cargo, the said wheat was badly damaged by sea water, and was discharged in the port of Boston, and by a

formal and regular survey and inspection thereof, held at the instance of master of said steamer, it was found and reported to be in such a badly damaged state and condition from the sea water wetting which it had sustained upon said voyage, and after it was loaded, as to be unfit for further transportation. That the libellants promptly notified "The London Assurance" of the said damage to the wheat and loss, and tendered an abandonment of all their right, title and interest in said wheat to the said corporation. That said company refused to accept an abandoment, and denied its liability for said loss or damage to the wheat. That the libellants thereupon, though not bound to do so after said denial of liability by said company, served upon them proofs of the loss and interests of the libellants in said wheat, properly authenticated, and that more than thirty days have elapsed since the service of said proofs.

Fourth.—That a collision having occurred, as aforesaid, after said cargo was loaded, the condition upon which said policy became a general one, protecting libellants against partial losses, was thereby fulfilled, and The London Assurance, by reason thereof, under the terms of its policy and the principles of the maritime law, became bound to pay and indemnify the libellants for a partial as well as for a total loss on said wheat, whether caused by said collision or other peril of the sea.

Fifth.—That the policy under which said certificate was issued provides that, "in case of any loss or misfortune, it "shall be lawful and necessary to and for the assured, their "factors, servants and assigns to sue, labor and travel for, "in and about the defence, safeguard and recovery of the "said goods and merchandise, or any part thereof, without "prejudice to this insurance, to the charges whereof the said "assurers will contribute according to the rate and quantity "of the sum herein insured."

That large sums were necessarily expended by the libellants upon said damaged wheat in and about the care, custody,

preservation, safeguard and defend and reconditioning thereof, and for the inspection, lighterage, towage, storage, insurance and repeated handling thereof in an elevator and other labor connected therewith, and for legal and other expenses for recovering possession, and for the sale thereof, for which the libellants are entitled to be paid and indemnified by said company under the sue and labor clause aforesaid of said policy, irrespective of and in addition to said company's liability for a partial loss.

That other charges and expenses in general average have been incurred by the libellants for the discharge of said wheat, survey thereof, superintendence, telegrams and numerous other expenses, the details of which are fully set forth in the general average account and proofs of loss which have been served upon said company by the libellants, for which charges and expenses the libellants are entitled to be indemnified and paid by said company under the express terms of said insurance, irrespective of and in addition to its liability for a partial loss.

Sixth.—That in pursuance of the recommendation of the surveyor, and with the consent of the said company, the said damaged wheat, after its condition had been improved as much as practicable at Boston, was sold by the libellants for the best price obtainable; and after deducting the proceeds of said sale, the claim of the libellants under said policy as and for a partial loss upon the wheat insured as aforesaid amounts to the sum of $10,451.34, with interest from the date of said loss. That libellants' claim in general average as aforesaid and for the special charges under the sue and labor clause aforesaid amounts to the sum of $4422, with interest from February, 1891. That the items of said general average and special charges are fully and in detail set forth in the general average account served upon the said company as aforesaid; and the account sales of said damaged wheat and statement of claim and proofs of loss served upon said company contain full and complete information as to the details and statement of libellants'

said loss. That said average account and account sales, proofs of loss and other documents are too numerous and voluminous to be appended to this libel, but the same will be produced on the assessment of the damages.

Seventh.—That in addition to the grounds of liability aforesaid, the libellants allege that said cargo at Boston was found to be so badly damaged by the perils insured against, as not to be worth the charges and duties thereon and the cost of transportation to Lisbon, and that said transportation to its destination would have resulted in a total loss in the value of the said cargo to the libellants; that by reason of said total loss of value "The London Assurance" became bound to pay the libellants as and for a total loss after deducting the net proceeds of the sale of the damaged wheat insured. That the amount of libellants' claim so estimated in the same as stated for the partial loss aforesaid.

Eighth.—That a copy of the certificate issued by said company as aforesaid is attached hereto and made part hereof, and marked "A." That the policy under which said certificate was issued is in the possession of the said company, and the libellants pray that said company may be required to produce in evidence or append to their answer a copy of the same.

Ninth.—All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the libellants pray that process in due form of law, according to the course and practice of this Honorable Court, in causes of admiralty and maritime jurisdiction may issue to the said "The London Assurance," citing and admonishing them to appear and answer all and singular the matters aforesaid; and that the Court will pronounce for the damages aforesaid with interest and costs,

"A"

INCORPORATED BY ROYAL CHARTER A. D. 1720

CERTIFICATE OF INSURANCE.

Marks and Numbers

In Bulk in Bin 1. 3000 bus.
"3 & 4. 30000"

$20,000 *Gold.* No. 546.

THE LONDON ASSURANCE

MARINE DEPARTMENT. PHILADELPHIA AGENCY.

Philadelphia, December 10th, *1890.*

This is to Certify *that on the* 8th of Dec., *1890, this Corporation insured under Policy No.* 427, *for* Lawrence Johnson and Co. . . . . Twenty thousand . . . . . *Dollars in Gold on* Thirty three thousand Bushels Wheat . . . . To cover the risk of lighterage to or from the Vessel, each craft or lighter to be considered as if separately insured. Free of particular average unless the Vessel be sunk, burned, stranded, or in collision. *valued at* Forty thousand eight hundred and eighty seven Dollars . . . . . *shipped on board of the* S. S. "Liscard" . . . . . *at and from* . . . . . New York to Lisbon . . . . . Portugal . . . . . *and it is hereby understood and agreed that in case of loss, such loss is payable to the order of* Lawrence Johnson and Co. *on surrender of this Certificate.*

This Certificate represents and takes the place of the Policy, and conveys all the rights of the Original Policyholder, (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy, direct to the holder of this Certificate, and free from any liability for unpaid premiums.

Brocklin & Welsh, Agents.

Notice: *To conform with the Revenue Laws of Great Britain, it is necessary to collect a claim under this Certificate, if made within ten days after the vessel in the United Kingdom*

It is hereby Understood and Agreed that in all cases of loss or damage to the interest insured under this Certificate the same shall be reported to the Corporation in London as soon as known or expected and be paid in Sterling at the current rate of exchange for sight drafts on London (£4.86.100) sold to the Pound Sterling. Claims to be adjusted according to the usages of Lloyds but subject to the conditions of the Policy and contract of Insurance.

HEAD OFFICE No. 7 ROYAL EXCHANGE LONDON

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gens do Barreiro aforesaid, and the same being read and filed, is in the words and figures following, to wit:

IN ADMIRALTY.

No. 8, of 1892.

The answer of The London Assurance to the libel of Companhia de Moagens do Barreiro, in a cause of marine insurance, respectfully showeth:

First.—That it is true that the respondent company caused insurance to be effected on thirty-three thousand bushels of wheat shipped by Lawrence Johnson & Co. on the steamer *Liscard*, "at and from New York" to Lisbon, Portugal, for which the said company issued its certificate of insurance, free of particular average unless the vessel be sunk, burned, stranded, or in collision, valued at $40,887, as set forth in the first article of the said libel; they have no knowledge or means of knowledge of the interest of the libellant in the shipment except from the statement in the said libel, and pray that the interest of the libellants therein and in the said policy may be proved as the libellants may be advised. Respondent admits that the terms of the policy were as stated in the second article of the said libel, but they have no knowledge of the other facts therein set forth, except from libellant's statement.

Second.—Respondent denies that the facts in relation to the alleged collision of the *Liscard* are correctly stated in the third article of the said libel; but alleges the statement in relation thereto is misleading by reason of the omission of the material fact that the collision occurred while lying at a wharf and before the voyage commenced. That the facts are that the steamer *Liscard*, after being loaded, was lying moored at a wharf in Brooklyn waiting for the completion of repairs to its machinery necessary to fit the vessel for the voyage to Lisbon. And that on the 12th of December, 1890, a scow which had been moored in the same dock as the *Liscard*, in leaving

the same under tow struck against the bulwark of the steamer on the port side, making a crack about three feet long, extending over two plates of the bulwarks, but doing no damage to the hull of the vessel itself. That the bulwarks of a vessel are not a part of the construction of the hull, but are placed along the sides of the deck for the protection and safety of those who are required to be on deck in heavy weather. Many steamers of modern construction are not fitted with bulwarks, but their place is supplied by iron rails or open network, which are considered preferable, as the water coming on board the vessel in heavy weather runs off immediately, while solid bulwarks retain the water when coming in volumes on the deck, causing the vessel to labor more heavily until it is discharged through the scuppers and openings made for the purpose of allowing the water to escape. The crack in the bulwarks of the *Liscard* received by contact with the scow did not affect the safety of the cargo which was stowed below with the deck hatches securely battened down. The injury was so unimportant in its character that the steamship left the port of New York, with the approval of Lloyds' surveyors, on the fifteenth day of December, the third day after the occurrence, without replacing or repairing the bulwark plates, as such repairs were not required and would have caused useless delay to effect them. The steamer also sailed again from Boston after the voyage was broken up at that port without repairing the same.

The respondent denies that any injury was received "in the iron side of the vessel" by contact with the scow, if it was intended to imply by the language used in the said article that the break occurred in any part of the side of the vessel or that any damage was or could have been occasioned to the cargo on the voyage by the injury to the bulwarks received before sailing. And they are advised that if the libellants intend to imply by the language in the said libel that damage to the cargo was sustained by reason thereof, the vessel was unseaworthy at the commencement of the voyage and no claim can be sustained by libellant for said loss occa-

and will give to the libellants such other and further relief as in law and justice they may be entitled to receive.

COMPANHIA DE MOAGENS DE BARREIRO,
per R. WINDER JOHNSON,
Attorney in fact for Libellant.

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

R. WINDER JOHNSON, being duly affirmed, deposes and says: That he is specially instructed as to the contents of the foregoing libel; that his firm is attorney in fact for the libellants, who reside in Lisbon, Portugal, and that the facts set forth in the libel are just and true to the best of his knowledge, information and belief.

Affirmed and subscribed to before me this eighth day of February, A. D. 1892. } R. WINDER JOHNSON.

JOHN F. LEWIS,
Notary Public.

And afterwards, to wit, on the 24th day of February, A. D. 1892, Morton P. Henry, Esq., Proctor of said Court, comes into said Court and exhibits the answer of The London Assurance to the Libel and Complaint of Companhia de Moa-

sioned by failure to repair before leaving port under the defendant's policy.

Respondent admits that subsequently on the said voyage the steamer *Liscard* met with sea damage by reason of which the vessel put into Boston for repairs.

Respondent admits that the cargo was discharged while awaiting the repairs, and that such discharge was a necessary and proper precaution by the master for the care of the same; but they deny that the said insured wheat was found to be in such a badly state and condition from contact with sea water during the said voyage, as to be unfit for further transportation to Lisbon, as alleged in the libel; and on the the contrary they aver that but a small part was seriously damaged and that the larger part of the said cargo, including the wheat insured under defendant's policy, could have been carried forward in the steamer *Liscard* to Lisbon, if the voyage had not been broken up as hereinafter stated.

The respondent admits an abandonment to the underwriters before proofs of loss were presented, which the respondent refused to accept, and the subsequent presentation of proofs of loss to the respondent as stated in the said libel. Respondent denied liability for a either a total or a partial loss under the terms of the said policy.

Third.—In answer to the fourth article of said libel, the respondent saith, that under the contract of insurance, in the certificate referred to in said libel, the respondent expressly excluded all liability for partial loss, unless caused by burning, stranding or collison.

That the loss and damage to libellant's cargo was not occasioned by any such cause, and was not in any manner connected with a collision, and they are advised that under the terms of this policy the respondent is not liable for a partial loss not occasioned by collision or the other causes mentioned in the said certificate; and it is expressly denied that such a contact of the scow with the bulwarks of the *Liscard*, while the latter vessel was lying at her dock and before the com-

mencement of the voyage, which necessitated no repairs, constituted a collison within the meaning of the contract as expressed in the certificate and policy sued upon in this case.

Fourth.—The respondent admits liability for general average, and has never disputed the liability of The London Assurance for its proportion thereof. A general average statement has been prepared and produced to the respondent, but the correctness of the same is not admitted by the libellant, and the allowance and apportionment of some of the items thereof is believed by respondent not to be correct. Until such an adjustment is finally accepted no settlement of general average can be made.

Fifth.—Respondent is advised that he is not required to answer the allegation of the fifth article of the said libel further than to say that for all charges and expenses justly payable in general average, under the sue and labor clause of the policy, the defendant company does not deny liability.

From papers and documents presented by libellants, and from other facts known to the respondent, the care and custody of the cargo after being discharged, and while the *Liscard* was undergoing repairs, and the expenses for the preservation thereof were incurred by the master and his agents at Boston, until the voyage was broken up and the cargo accepted by the libellant, on the twenty-seventh day of February, 1891, all such expenses are included in the general average accounts as presented. Respondent denies that large expenditures were made for the purposes by the libellants, as stated in the fifth article of said libel, or were necessarily incurred therefor; and the liability of the respondent for the same or for any expenses incurred by libellant for the recovery of the possession of the cargo, and the sale thereof, is denied under the sue and labor clause of said policy.

Sixth.—The respondent does not admit that the sale of the insured wheat was made in pursuance of a recommendation of a surveyor, and with the consent of the insurers, as alleged

in the libel. That the facts in relation to the sale were as follows:

The *Liscard* put into Boston in distress on the 24th December, 1890, and the cargo was discharged into lighters.

That shortly after the discharge of the cargo at Boston such a sale was recommended, but was not acted upon by the master.

The libellant was desirous of breaking up the voyage and Boston on payment of partial freight.

And the respondent at the request of the shippers and owners of the wheat agreed that the acceptance and sale of the wheat by them should be without prejudice to the claim on the insurers or their defense under the policy.

That before the acceptance of the said cargo at Boston the same had been placed in grain elevators by the master and reconditioned, and a subsequent survey called on the twenty-seventh day of February reported all except a fractional part of the cargo to be in a condition capable of going forward in the *Liscard*. The voyage was broken up under an arrangement between the shippers and the master of the *Liscard*, and the wheat accepted by libellants from the master at Boston and sold by them. That subsequently a claim was presented to respondent company for $10,451.34, a copy of which is hereto annexed, which claim was based upon the difference between the insured value of the wheat and the result produced by the sales, after deducting commissions at the rate of two and one-half per cent. on gross sales, and adding to the loss so appearing the proportion of general average and special charges on cargo, and of a further charge of $1750.60 for the agency expenses of the libellant. The respondent saith that the charges for libellant's expenses to the cargo are not only excessive in amount, but such as are not properly chargeable to the insurers under the sue and labor clause of the policy, if the respondent company was liable for a partial loss, which is not admitted.

Respondent denies that separate claims for a partial loss to the insured wheat were made for $10,451.34 and for $4422

for general average and special charges under the sue and labor clause of the policy appear in the proofs produced, or were ever presented to the company, as set forth in the sixth article; but they aver that the only claim made was as herein stated.

The respondent denies all ability for partial loss or for a total loss, and avers the willingness of the company to pay its proportion of the general average charges when the same is properly adjusted, and they expressly deny all the allegations of the seventh article of said libel in manner and form as therein alleged; and they expressly aver that the said cargo, including that part insured under the respondent's policy, was, as to all except a small portion, found after landing to be fit for transportation to Lisbon, and that the larger part thereof was actually exported to Europe after the voyage was broken up at Boston. They expressly deny that its transportation to destination in the *Liscard* would have resulted in a total loss in value of the said cargo to libellant.

Eighth.—Respondent believes that the copy of the certificate attached to said libel is a true copy, but for greater certainty prays that the original may be produced; and attaches to this answer a copy of the policy of insurance referred to in said libel, as requested by the libellant.

Wherefore the respondent prays that the said libel may be dismissed with costs.

BROCKIE & WELSH,
Agents.

WILLIAM BROCKIE, being duly sworn, says he is a member of the firm of Brockie & Welsh, agents in this city of The London Assurance; that the facts stated in the foregoing answer of his own knowledge are true, and those stated upon information or belief he believes to be true.

WM. BROCKIE.

Sworn and subscribed before me, this twenty-third day of February, 1892.

JOHN RODGERS,
Notary Public.

[SEAL]

K 75

Statement of loss on cargo of grain per S. S. "Liscard," from New York to Lisbon, and insured by The London Assurance Company:

There were shipped per first set of bills of lading thirty-three thousand bushels grain		$40,887 00
Insured for in—		
International Marine Insurance Company . .	$20,887 00	
The London Assurance Company	20,000 00	
	$40,887 00	
There were sold thirty-two thousand seven hundred and fourteen and forty-eighth-sixtieths bushels grain . .		$28,544 15
Net proceeds—		
Loss		$12,332 85
Add charges per adjustment on first and third sets of bills of lading:		
General average on cargo	$3,331 28	
Special charges on cargo	13,405 55	
	$16,736 83	
Charge half to set bill of lading No. 1		$8,368 42
		$20,701 27
Proportion of $1750.04 special on cargo and owners on sale of thirty-six thousand one hundred and two and fifteen-sixtieths bushels		664 93
Claim		$21,366 20
Amount due by The London Assurance Company	$10,451 34	

E. & O. E.

LAWRENCE JOHNSON & CO.

PHILADELPHIA, November 14, 1891.

Cargo. No.

A THE LONDON ASSURANCE,

Incorporated by Royal Charter, A. D. 1720.

Head Office, No. 7 Royal Exchange, London.
Marine Department, Agency at Philadelphia, Pa.

on account of

In case of loss to be paid to

Do make Insurance, and cause to be insured lost or not lost, at and from upon all kinds of lawful goods and merchandises, laden or to be laden on board the good called the whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called

Beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this Insurance. The said Goods and Merchandises hereby insured are valued (premium included) at

Touching the adventures and perils which the said assurers are contented to bear, and take upon themselves in this voyage, subject as hereinafter provided, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the masters and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or

damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured
factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said assurers will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured, or
assigns, at and after the rate of

And in case of loss, such loss to paid in thirty days after proof of loss, and proof of interest in the said
(the amount of the premium, if unpaid being first deducted,) but no partial loss, or particular average shall in any case be paid, unless amounting to five per cent. *Provided always*, And it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said assurers shall be answerable only for so much as the amount of such prior assurance may be deficient toward fully covering the premises hereby assured; and the said assurers shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said assurers shall nevertheless be answererable, subject as hereinafter provided, for the full extent of the sum insured by this policy, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said assurers shall not be liable for more

than a rateable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. *It is also agreed*, that the property be warranted by the assured free from charge, damage or loss, which may arise, in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to the assurers. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of a blockade, to be at liberty to proceed to an open port and there end the voyage.

And the assurers are contented, and do promise and bind themselves, to the assured, their executors, administrators or assigns, for the true performance of the premises, for the amount herein insured.

In witness whereof the undersigned on behalf of the said London Assurance have hereunto set their hand in Philadelphia, day of , 18

Memorandum. It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread, are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in

bags or bulk, and rice, free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy (except caused by actual contact of sea water with the articles damaged), occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandises, as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun, and shall have terminated before the date of this Policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return premium, in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$ Dollars.

Agents.

Cargo on deck free from claims for loss by wet, breakage, leakage or exposure.

Proof of loss to be authenticated by the Agent of the Assurers, if there be one at the place such proofs are taken.

Warranted by the assured free from claim on account of capture, seizure, detention or destruction by or arising from any belligerent nation, or by or from any officer, civil or military, or other person claiming to act in their name or under their authority or in their behalf.

And afterwards, to wit, on the 24th day of March, A. D. 1893, the libellant by its proctors prays leave to amend its libel, and the same being allowed and filed is in the words and figures following, to wit:

COMPANHIA DE MOAGENS DO BARREIRO.	U. S. D. C.
vs.	In Admiralty.
THE LONDON ASSURANCE.	No. 8, of 1892.

And now, this 24th day of March, A. D. 1893, on motion of Curtis Tilton and John F. Lewis, proctors for libellant, and by leave of Court the libel in the above case is amended by inserting after the word voyage in the eighth line of the First Article of the printed libel, the words following: "at and from New York to Lisbon, laden or to be laden"; and by adding at the end of Article Second, the following words: "beginning from and immediately following the loading thereof on board of said vessel at New York, laden or to be laden."

And afterwards, to wit: on the fourteenth day of April, A. D. 1893, this cause comes on to be heard on libel, answer and proofs, and by consent of parties, by their proctors aforesaid, this cause and Cause in Admiralty, No. 10 of 1890, to wit: Companhia de Moagens do Barreiro against The Mannheim Insurance Company, of Mannheim, are heard together, and statements of facts and conclusions of law, as also depositions on behalf of the respective parties, are presented and read, and the same being filed are in the words and figures following, to wit:

Depositions taken in pursuance of a rule duly entered in the above entitled cases, for the examination of going witness, at the office of John F. Lewis and Curtis Tilton, Esq., No. 244 South Third Street, Philadelphia, upon Wednesday, January 28, 1891, at 2 o'clock, p. m., the rule being returnable at that hour and place.

Present.—Messrs. JOHN F. LEWIS and CURTIS TILTON for libellant.

MORTON P. HENRY, ESQ., for The London Assurance, the Manheim Insurance Company, The International Marine Insurance Company, Limited, and the Western Assurance Company, of Toronto.

FREDERICK CAMPBELL, being duly sworn according to law, deposes and says:

By MR. TILTON:

Q. You are the master of the British steamer *Liscard*, are you not, captain?

A. Yes, sir.

Q. Where does she hail from?

A. London.

Q. What is her registered tonnage?

A. 1241.

Q. What is she built of?

A. Iron.

Q. How old is she?

A. She was built in 1880.

Q. Where do you reside, captain?

A. London.

Q. Where is your ship now?

A. Boston.

Q. And you came on to Philadelphia on business for the ship, did you not?

A. Yes, sir.

Q. And when the business connected with this cargo is settled, you expect to leave the country with your ship do you not?

A. Yes, sir.

Q. You expect to go in her when she sails from Boston?

A. Yes, sir; I expect so.

Q. How soon do you expect the ship to be ready to go as far as the preparations which the ship herself has to make?

A. Well, it entirely depends. If the ship goes away in ballast, we could leave in a few days, but if she is to take another cargo, I couldn't state, because the holds are not dry enough.

Q. What was the last cargo your ship loaded, and where?

A. From New York.

Q. And what was it?

A. Bulk grain.

Q. For whom did she load?

A. Lawrence Johnson & Company.

Q. When did the loading begin?

A. (Referring to log-book). December 5th.

Q. And when was the loading finished?

A. December 11th.

Q. What time on the 11th of December?

A. 8.15 in the morning.

Q. Please look at the bills of lading for 22,000 bushels of wheat in bulk and ship's bags, dated December 10, 1890, for grain shipped by Lawrence Johnson & Co., on the steamship *Liscard*, from New York for Lisbon, and state whether that is one of the bills of lading for the voyage of the *Liscard* from New York to Lisbon, issued and signed by you?

A. Yes, sir; that is one of them.

(Said bill of lading, marked "Libellant's Exhibit A., January 28, 1891, W. H. S., Jr.")

Q. Please look at the bill of lading for 33,000 bushels of wheat in bulk, shipped by Lawrence Johnson & Co., per steamer *Liscard*, from New York for Lisbon, dated December 8, 1890, in bins 13, 3 and 4, and state whether that is one of the bills of lading issued and signed by you for the voyage in question?

A. Yes, sir; that is one of them.

(Said bill of lading, marked "Libellant's Exhibit B, January 28, 1881, W. H. S., Jr.")

Q. Please look at the bill of lading for 33,000 bushels

of wheat in bulk and ship's bags, shipped by Lawrence Johnson & Co. on the steamship *Liscard* at New York, for Lisbon, dated December 11, 1890, being shipped in bulk and in 1542 ship's bags, sewn with grey twine, and state whether that is the bill of lading, signed by you?

A. Yes, sir; that is one of them.

(Said bill of lading, marked "Libellant's Exhibit C, January 28, 1891, W. H. S., Jr.")

Q. Were you aboard of the vessel while she was being loaded?

A. Not all of the time.

Q. You were there at certain times?

A. Yes, sir.

Q. Did you see any of this wheat which was taken on board?

A. Yes, sir.

Q. Was it, as far as you could see, in good order and in condition?

A. Yes, sir; as far as my knowledge of grain goes.

Q. Where did the ship take on her cargo?

A. At the iron elevator at Brooklyn. That is not the proper name, but it is the only one that I have heard it called by.

Q. After the cargo of wheat was loaded on board of the steamship *Liscard* was she run into by another vessel?

A. She was run into by a scow.

Q. Was the scow in tow?

A. Yes, sir.

Q. Of what tug?

A. Afterwards I found it was the *George Carnie.*

Q. Was it not the *John A. Carnie?*

A. No, sir; it was the *George Carnie.*

Q. Where was the ship laying at the time of the accident?

A. At the iron elevator.

Q. In the same berth where she had taken in her cargo?

A. The same berth exactly.

Q. When did the collision take place—what time?

A. Shortly after 8 o'clock.

Q. On what day?

A. (Referring to log-book.) At 8.15 p. m., December 12.

Q. That was a day after the cargo was loaded?

A. Yes, sir.

Q. Was any claim made on behalf of your ship upon the tugboat or lighter that ran into you for the damages which you sustained?

A. I made a claim personally.

Q. Was the claim settled?

A. Yes, sir.

Q. How much did they pay your ship in settlement of the collision damage?

A. Two hundred and fifty dollars.

Q. What part of the steamship *Liscard* was struck in the collision?

A. The bulwarks on the port side, in the wake and forepart of the main rigging.

Q. Was the damage inflicted upon the steamship *Liscard* very nearly abreast of the engine room or directly abreast of it?

A. Little abaft.

Q. How far—right on the corner of the engine room?

A. It was abreast of the end of the engineer's house.

Q. Is there any entry in the log-book of the steamer *Liscard* in relation to the collision?

A. Yes, sir.

Q. By whom was that entry made?

A. Chief officer.

Q. How does the entry read?

(The entry is read, subject to any objection by Mr. Henry.)

A. (Reading from log-book): "At 8.15 p. m. a lighter "being towed out of the dock by tug *George Carnie* ran into

"us, breaking two plates in the bulwarks, bending stanchions, "starting main-rail, etc. Anchor watch kept all night."

Q. Of what material are the two plates referred to there as being broken?

A. Iron.

Q. And how thick is the iron of these plates?

A. Not anywhere greater than half an inch.

Q. How long was the break in the two plates which was caused by the collision?

A. As near as I can remember it was very nearly three feet.

Q. How much of an opening did the broken plates make?

A. Some places you can see daylight through only.

Q. In other places was it large enough to insert a lead pencil?

A. Not the whole of a lead pencil.

Q. Well, part of a lead pencil?

A. Yes, sir.

By MR. HENRY:

Q. What part.

A. Half way up, where it is sharpened. Something like that (indicating the sharpened end of a lead pencil).

By MR. TILTON:

Q. Is the description of the damage contained in the log-book correct as you have read?

A. To the best of my knowledge and belief it is.

Q. Was the damage to the ship surveyed before the ship left New York?

A. Yes, sir; it was.

Q. By whom?

A. By Mr. Thomas Congdon, Lloyd's surveyor.

Q. Did he make a written report upon the damage?

A. I believe so.

Q. Is that a copy of the report (handing paper to the

witness), marked "Libellant's Exhibit D, January 28, 1891, W. H. S., Jr.," but not offered in evidence at this time?

A. Yes, sir.

Q. Was the damage caused by the collision repaired before the vessel left New York?

A. No.

Q. And it was not repaired because of the report which Lloyd's surveyor made in respect to it?

A. Yes, sir; that is it.

Q. When did the vessel sail from New York?

A. December 15th.

Q. I notice in your log-book under date of December 16th this entry: "Engines stopped; repairs." Will you please explain what the stoppage was for and what the entry means?

A. I am not an engineer enough to tell you what it is.

Q. Well, just state it generally?

A. Well, I can't remember what it was. It might have been tightening up the nuts, or something of that kind, which is a very usual thing. If it had been anything serious I would have known everything about it. It might have been tightening up the nuts or something of the kind.

Q. Well, when the ship is about beginning a long voyage is a short stoppage, for the purpose of tightening up different parts of the engines and machinery, a customary thing or not?

A. It is, when necessary.

Q. Is it an uncommon thing on the part of the ship?

A. No, sir; it is not an uncommon thing at all.

Q. Does it indicate any defect or want of seaworthiness on the part of the ship?

A. No, sir; not at all, sir.

Q. What was the condition of the ship when she left New York?

A. She was efficient throughout for her intended voyage.

Q. Was she seaworthy in every respect?

A. Yes, sir; well founded and well manned.

Q. What cargo did she carry to New York upon her previous voyage?

A. She had a general cargo; sugar and a general cargo.

Q. And you delivered in good order and condition?

A. Yes, sir; in good order and condition.

Q. What kind of weather did the ship encounter after leaving New York generally. I don't want the days. I don't care about going into as much as that?

A. Fresh breezes.

Q. Subsequently, what weather did you have?

A. Gales and hurricanes.

Q. Did the vessel ship any water during the gales and hurricanes on deck?

A. She did.

Q. Did any water come on deck through the broken plates in the bulkwarks which was caused by the collision and to which you have referred?

A. A little must have come.

Q. How many days did the high seas, gales and hurricanes last?

(Mr. Henry asks the counsel for the libellants if they attribute the damage to this cause, and if that is the object of this question.)

(Mr. Tilton states that counsel for libellants shall claim whatever the proofs warrant them in claiming.)

A. Eight days.

Q. And during all of that time, there was more or less water coming through the broken plates caused by the collision?

(Objected to by Mr. Henry as leading.)

(Question withdrawn.)

Q. During how many days was the sea sufficiently high for more or less water to come through the broken plates caused by the collision, in the manner you have stated?

(Objected to by Mr. Henry as leading.)

WITNESS.—I want to know if you mean the sea that came over the rail at the same time?

MR. TILTON.—Include that as well.

A. Eight days.

Q. Now, did any of the water that came on the deck get down into your cargo, and if so, please explain how it got down?

A. The sea that came over the rail?

Q. Any water on the deck. You cannot separate one lot of water from another.

MR. HENRY.—I think he certainly can.

Q. I want to know if the ship labored any?

A. Yes, sir; but before I answer your other question, Mr. Tilton, does that mean the sea what came over the rail or in the bulwarks?

Q. I refer to any water coming on the decks.

A. But you have not mentioned the water coming over the rail as well as that coming in the crack.

Q. I told you to include in your previous answer, the water that came over the rail on to the deck, as well as the water that came through the bulwarks.

A. About eight days.

Q. And was that from the crack, too?

A. I didn't hear you say over the rail as well. Yes, sir. That is where I was wrong.

Q. Including both the water that came over the rail on to the deck, and that which came through the broken plates on to the deck, will you please state whether any of the water got down through the decks on the cargo—in the hold—and if so, explain fully in what ways the water got down there?

A. Through the seams.

Q. What caused the seams to open so as to let the water down?

A. The excessive straining of the ship caused by heavy gales of wind.

Q. And for how many days did that condition of affairs exist?

A. Do you mean from the time we discovered the water coming down through the decks?

Q. I mean from the time you discovered that the water was going down to the cargo through the seams.

A. Well, it is not entered at the hour it commenced.

Q. Well, can't you state it from your personal recollection, whether it was several days?

A. I reckon (referring to log-book) it was in the evening of December 17th when we discovered that the decks were leaking.

Q. And it continued up to what time?

A. Up to 2 p. m., December 24th. (Referring to log-book).

Q. Could the water going through the decks in the manner you have described damage the wheat in the lower hold and in the between decks?

A. It could in a manner.

Q. Was there any other way in which the cargo was damaged than that which you have described?

A. Yes, sir; the water went down the four hatchways.

Q. How was that caused?

A. That was caused by the tarpaulins being torn out from under the batten by the heavy seas which continually swept over them.

Q. Now, when did you decide running into a port of refuge with your ship?

A. As soon as the high-pressure engine was disconnected, and after we got her under way with the low-pressure engine, I decided then to make for the nearest port.

Q. And you headed towards Boston?

A. No; I kept her head up to the sea as near as I could, as it was so heavy, and that gradually brought me into the land in the vicinity of Boston Bay, and as soon as I got into the vicinity of Boston Bay, I decided it was better to go into Boston, and to go there as soon as possible. That is it, sir.

Q. What caused the disconnection of the high-pressure engine?

A. The disabling of the high-pressure engine.

Q. How was it disabled? Just explain how it was disabled?

A. Well, now, I am not an engineer, and you will have to bear it as I can give it. We didn't know what it was until we arrived in Boston and had the thing opened out and examined. We found that the high-pressure piston was bent.

Q. Well, had that occurred in the gales and hurricanes?

A. Yes, sir; it was caused by the excessive straining of the ship—the laboring, rolling and tumbling about of the ship.

Q. Was there other damage to the machinery and engines caused in the same way?

A. There was.

Q. Serious?

A. Well, I do not know what an engineer would call serious, but it was sufficient to assist in disabling the high-pressure engine.

Q. In these gales did your ship get a list to the port? Do you remember?

A. Yes, sir; slightly. We had a list subsequently to starboard.

Q. Do you remember how long she labored with the port list?

A. No, I couldn't say.

Q. When you arrived in Boston what was done with your cargo?

A. It was surveyed, and it was also discharged.

Q. Was the survey called at your instance and request as master of the ship?

A. Yes, sir.

Q. The surveyors made a written report and recommendations, did they not?

A. Yes, sir; they did.

Q. Captain, will you please look at the entry for December 12 in the log-book. I find there stated that at 9 a. m.,

"unmoored ship." Was that for the purpose of starting on your voyage?

A. Yes, sir.

Q. And that was before the collision occurred, was it, captain?

A. Yes, sir.

Q. Did you find the wheat damaged in all the holds of the ship when it was discharged?

A. Yes, sir.

Q. Is that the log-book of the ship to which you have been referring (indicating book)?

A. Yes, sir; it is.

Q. I believe you asked for instructions from the owners as to whether you could leave the log-book here for the purposes of this litigation. Are you able to answer now whether you can leave it?

A. I am not.

(Mr. Henry asks the captain if he has written to his owners to have the log-book produced.)

(Mr. Tilton states the counsel for the libellants will produce the log-book if they can; if not, a copy will be made.)

MR. HENRY.—The original would be more satisfactory.

CROSS-EXAMINED.

By MR. HENRY:

×*Q.* On Friday, December 12, at 9 a. m., you unmoored your ship, but made fast again to the wharf, as the engines would not work?

A. Yes, sir.

×*Q.* At 8.15 a lighter ran into you, as stated here, and you were moored to the wharf, were you not?

A. Yes, sir.

×*Q.* Now, the plates which were injured were all above the spar deck?

A. All above the deck.

×*Q.* That is the upper deck?

A. The main deck.

× *Q.* These bulwarks are how high on your ship?

A. Well, I can't tell you.

× *Q.* Well, as near as you can?

A. I can just put my arm on them as I stand up on the main deck.

× *Q.* Some vessels have only a rail around and some have bulwarks?

A. Yes, sir.

× *Q.* And yours have bulwarks?

A. Yes, sir; and I am glad she had.

× *Q.* Now, these gentlemen have been asking you about the crack in plates of the bulwarks and you recall the question. Could much water get through that crack?

A. Well, some could get through.

× *Q.* About how much?

A. That I couldn't tell you.

× *Q.* Give us some idea of how much water could go through that crack?

(Objected to by counsel for the libellants, as the captain has said he cannot possibly tell.)

A. I couldn't possibly tell it.

× *Q.* What water was it that washed the tarpaulin covers off your hatches?

A. The seas.

× *Q.* It was the water that came over the rail that washed them off?

A. It came over the rail.

× *Q.* That would have had the same effect whether the plate had been cracked or not?

A. Yes, sir.

× *Q.* It had nothing to do, therefore, with washing your tarpaulins off of your hatches?

A. Not that I am aware of.

× *Q.* Have you any doubt of it?

A. No.

× *Q.* Would your vessel have been in a seaworthy and fit condition to go to sea if it could?

A. I dont get the drift of your question.

× *Q.* Do you mean to say that your vessel was not perfectly seaworthy in consequence of this injury to your bulwarks, do you mean that?

A. I don't mean to say that.

× *Q.* Could that crack in your bulwarks have any effect upon washing off the tarpaulins?

A. No, sir.

× *Q.* Now, captain, will you please describe to me, so as to get information as to this cargo, where is bin No. 1?

A. No. 1 bin is in No. 1 hold.

× *Q.* Where is that?

A. The fore end of the ship.

× *Q.* Where is No. 2 bin?

A. Between the No. 1 and the centre of the ship.

× *Q.* And where is No. 3 bin?

A. From the fore part of the engine room to the commencement of bin No. 4, working aft.

× *Q.* And where is No. 4 bin?

A. From the end of No. 3 bin, working aft, to the stern of the ship.

× *Q.* You have a between decks, have you not?

A. Yes, sir.

× *Q.* Was there any wheat stowed there?

A. Yes, sir.

× *Q.* Well, are the bins in the between decks or in the lower holds?

A. No, sir; there are no bins in the between decks?

× *Q.* The bins are in the lower hold, are they?

A. Yes, sir; when a cargo is put in bulk in a ship's hold it is separated by a partition, and that is what we call a bin. And the bins are numbered 1, 2, 3 and 4 according as the hatchways are numbered. They were in the four holds.

× *Q.* Well, No. 1 was in the fore hold?

A. That is in the forward hold ; yes, sir.

× *Q.* And where is the No. 2 ?

A. The after part of No. 2 hold is divided by a bulkhead to separate a certain portion of the cargo, as in case of a different class of grain or to different consignees or something like that. This bulkhead was about several feet from the coal bunker, and formed a separate bin for this little parcel of 20,000 bushels and some odd. What that bin did not hold was put into bags and sewn up with red twine. We finish the question of No. 2 bin. The bags were stowed up in the between decks ?

× *Q.* Now, No. 3, describe what that was ?

A. Nos. 3 and 4 were simply the lower hold. Simply called bins from the mere fact of having a hatchway.

× *Q.* In the between decks, between Nos. 3 and 4, what was stowed there ?

A. Cargo in bags—grain bags sewn up with twine.

× *Q.* With grey twine ?

A. Some red and some grey.

× *Q.* The cargo in bags, then, was all in the between decks, was it ?

A. Yes, sir.

× *Q.* In the hold was where the most damage to the wheat was found ?

A. Well, now, I am unable to state that. The surveyors know that.

× *Q.* You say that the surveyors know that ?

A. Yes, sir.

× *Q.* Did they take notes at each hold as the wheat came out ?

A. Yes, sir.

× *Q.* All this information is in the United States ?

A. Yes, sir.

× *Q.* You have described the break in your bulwarks. Two plates were broken only, were they not ?

A. Yes, sir.

× *Q.* That was caused by the lighter ?

A. By the scow.

× *Q.* What part of the scow was struck?

A. I am unable to tell you that; it was dark.

× *Q.* Was your rigging carried away?

A. No.

× *Q.* It struck the rigging, did it not?

A. No, sir; it struck the bulwarks.

× *Q.* The rigging came inside of the bulwarks?

A. The rigging was just about at that angle (indicating with his hand). It is secured inside of the bulwarks and that is the reason the rigging was not hurt.

× *Q.* Now, just draw with me from a pencil the size of the crack in the bulwarks?

A. I can't. I am a very poor hand at the pencil, Mr. Henry. The ship is not furnished with an architect.

× *Q.* What was the length of the break in the plate?

A. Well, I can't tell you. I just merely had the length in my eye to judge.

× *Q.* Well, judging by the eye?

A. I didn't know where the crack stopped or commenced. I couldn't tell you.

× *Q.* What was the length of the crack?

A. About three feet. That is from end to end.

× *Q.* It was only one crack?

A. One crack.

× *Q.* There was only one crack in the one plate?

A. There were two plates. It extended over two plates at the joint above the main deck.

× *Q.* Please give me the biggest width of the crack at any part.

A. About that (indicating three-eighths of an inch). I couldn't give exactly.

× *Q.* Did it extend along the whole crack that width?

A. That was only at some places. At other places you could only see daylight.

× *Q.* If you were to dash a bucket of water against it, how much water would go through?

A. That I am unable to answer.

×*Q.* Any water that got through that crack, do you think would have injured your vessel?

A. Well, the water going through wouldn't injure the vessel.

×*Q.* You are sure?

A. Yes, sir.

×*Q.* Could the water that went through the crack have washed off your tarpaulins?

A. Not unless you closed up the ports and scuppers that held it there.

×*Q.* Had that crack anything to do with washing your tarpaulins off?

A. No.

×*Q.* If any injury could have occurred to your vessel by reason of that injury to the bulwarks, would you have gone to sea without repairing it?

(Objected to by counsel for libellants.)

A. No, sir.

RE-EXAMINATION.

By MR. TILTON:

Q. Will you please explain the entry in the log-book, "Could not get engine to work," under date of December 12th?

A. I don't know. It is not the chief officer's business to know why the engine will not work. The engineer reports to the first officer the fact that the engines are not ready to start, then the officer enters it in his log-book.

(Mr. Henry states that if there is any question as to this point the engineer ought to be called.)

Q. What do you understand as having been the difficulty on that morning with the engines, captain?

(Objected to by Mr. Henry.)

A. Well, as I can remember, the high pressure slide valve was slightly off, and the spindle was slightly bent. That was gist of what the chief engineer reported to me.

Q. Is that a trifling matter?

A. That is a mere nothing. It didn't take very long to fix it.

Q. Do you mean to fix it all right?

A. Yes, sir; it only took a few hours or so.

RE-CROSS-EXAMINATION.

By MR. HENRY:

×*Q.* What delayed you two days—to the 15th?

A. Well, this is why, on Friday this happened. Saturday it took to let the boilers and machinery cool down properly. It took a long time to take out these hot valves, and they were heavy. It took so long to get them out. The next day was Sunday. They worked all night, and the next morning the damages was all right.

×*Q.* On Monday the survey was made?

A. I think it was on Saturday, but I am not sure. In the winter we cannot allow our boilers to be heated or cooled down too quickly, unless we want to injure them. The time occupied was consumed really in cooling the boilers. In fact, it occupied the two-thirds of the time. We had a great deal of trouble to get the men to work on Sunday.

×*Q.* So the circumstances is this. On Friday morning you found that the ship was not ready to go; the engineer reported her as not ready.

A. Yes, sir.

×*Q.* And you did not start then until Monday morning?

A. Yes, sir; at 11.45.

×*Q.* Your voyage commenced on that day, did it?

(Objected to by counsel for libellants.)

A. Yes, sir.

×*Q.* As a matter of fact your starting was on Monday at 11 o'clock?

A. A sailor fixes the commencement of his voyage at the time when he casts off and gets a tugboat ahead.

×*Q.* And that occurred on Monday, at 11.45?

A. Yes, sir; whether the commencement of the voyage is considered otherwise by people on shore, of course, I am unable to state.

× *Q.* You never left the wharf on Friday?

A. I rang up full speed from the wharf, but she would'nt move.

× *Q.* And then you tied up again?

A. Yes, sir.

A. No, sir.

× *Q.* When you unmoored?

A. We unmoored and cast adrift.

(Signature waived.)

R. G. L. CANDAGE, being duly sworn according to law, deposes and says, that he is a marine surveyor at Boston, Massachusetts, and has occupied that position for twenty-five years. That he is frequently called upon to make surveys of vessels, in cases pending in the Admiralty Courts for the District of Massachusetts. That at the request of Curtis Tilton, one of the Proctors for the Libellants, the deponent went on board of the steamer *Liscard*, in Boston, on March 2, 1891, after her cargo of wheat had been discharged, and made correct measurements and a plan of the collision break in the bulwarks on the port side of said steamer, about abreast of her mainmast. The deponent found that said break was of irregular shape and eleven feet six inches long, when the measurements followed the line of the break. The break was a continuous one in two of the iron plates of the bulwarks. The plan or drawing attached hereto shows correctly the position, direction, length, shape and opening of the break. As shown in said plan the break began a little above a fore and aft line, half way between the deck and the top of the bulwarks, and descended to about eight inches above the deck at its lowest point. For the first two feet, beginning from the forward end of the break, it showed an opening of from one half inch to one inch; for the next three feet the break was open one and a half inches; for the next four feet the break was open from one-half to one and a quarter inches, and the

after end of the break for one foot and six inches was open but slightly. A spur extended from about the middle of the break upwards for one foot as shown in the drawing. The damage had not been repaired at the time of my measurements. The plan is drawn to a scale of one inch to a foot. The bulwarks were of plate or sheet iron three feet high above the deck.

Sworn and subscribed to before me, this second day of April, A. D. 1892.

R. G. F. CANDAGE,
Marine Surveyor.

[SEAL] JOHN BRADFORD,
Notary Public.

It is agreed that the above affidavit may be read as evidence with the same effect as if the deponent had been regularly called and examined as a witness in the cause.

WILLIAM T. BERNARD, being duly sworn according to law, deposes and says: I have been going to sea about thirty-two years and have had charge of steam vessels for six years. I reside in the City of Philadelphia, and am present acting as an Assistant Surveyor of Damaged Vessels and cargo in this port. I know of the steamship *Liscard*, and in the spring of 1891, when the steamer was in Philadelphia, after she had come from Boston to this port, and was loading at Point Breeze, I made an examination of the collision break in her port bulwarks about abreast of the mainmast. The after end of the break came on about a line with the mainmast. I made at the time a drawing of the break, which I will produce, if required. The drawing of the break made by R. G. F. Candage and the measurements of the same, I have examined and find them to be substantially the same as that made by myself, with the exception that at the time of my inspection of the damage, the opening of the break was less than shown in the diagram of Mr. Candage. The broken plates showed signs at the time I examined them of having been pressed,

driven or pounded together in such a way as to reduce the size of the opening, and the carpenter of the ship stated to me at the time that such had been in fact done. The collision break was in the bulwarks of the vessel, and in my opinion, as the deck of that ship is arranged, the bulwarks form an important and essential part of the hull of the steamer. In some cases the bulwarks are dispensed with and an open rail used, but those are cases of flush deck vessels, the entire length of whose deck stands well out of the water. Such vessels have, as a rule, but a comparatively small portion of their houses, engine rooms, galleys, etc., above deck, but in the case of a vessel like the "Liscard," where all her houses are upon the deck and her main deck is, comparatively speaking, low— I mean low as compared with the upper deck of a flush deck vessel—the bulwarks form an important part of and protection to the ship in keeping the water off the decks and protecting the houses and seamen. I did not examine the ship's scuppers, but a vessel of her size would have about five on each side and their size would be about five inches long and from one and a half to two inches in width or depth. The hawse holes are always at the bow of the steamer where the ship is high. The chucks in the bulwarks, where the mooring lines are put out, are on the forward and after quarters of the ship, where the ship is also higher. In my opinion a large quantity of water in a gale, accompanied by high seas, would go through the break in the steamer's bulwarks which I inspected with the break open to the extent shown in the survey and drawing made by Mr. Candage. Many seas which would not be high enough to go over the rail, would send a large quantity of water through this break, and if the storm were extraordinarily severe would overtax the capacity of the scuppers to relieve the deck. Except in such a case of extraordinary weather, the break would be unimportant; it wouldn't render the ship unseaworthy.

Sworn and subscribed to before me this twenty-eighth day of March, A. D. 1892. } W. T. BERNARD.

[SEAL] FRANCIS C. ADLER,
Notary Public.

We insured the wheat covered by the bills of lading in evidence in this case, being the wheat in controversy in these suits, by the request of the libellants and for their account. The premiums were paid by the libellants and in the invoice the premium will be found at the foot charged against the libellants.

We made the insurance for the libellants and on their account and by their direction and at their expense; the certificates were issued in our names as shippers because that is the usual course of trade. We always do so.

I produce the original certificate of insurance issued by the Manheim Insurance Company, of Manheim, Germany, dated December 12, 1890, for $10,000, on 33,000 bushels of wheat in bulk, and 1542 bags valued at $40,887, shipped on board the steamer *Liscard* at and from New York bound for Lisbon, Portugal.

I also produce the original certificate of The London Assurance, dated Philadelphia, December 10, 1890, for $20,000, on 33,000 bushels of wheat valued at $40,887, shipped on board the steamer *Liscard* at and from New York to Lisbon, Portugal. The loss is made payable by these certificates to our order, and upon receipt of these certificates we endorsed them in blank, that being the usual course of the trade —the same manner as with the bills of lading. These were a part of what we call negotiable documents, and they are always issued in this way, the purpose being to enable us to forward them to the banker who is drawn upon in making payment for the shipment. They are the shipping documents against which we draw upon the bankers, and they are forwarded by us to the bankers by the instruction of the buyer upon the other side, upon receipt of which he accepts. The certificate issued by the Manheim Insurance Company covers the wheat issued under bill of lading marked "C," dated the eleventh day of December, 1890, and the certificate issued by The London Assurance covers the wheat named in the bill of lading marked "Libellants Exhibit B," and dated New York, eighth of December, 1890.

(These certificates are offered in evidence by the libellants, and marked "Libellant's Exhibits, D & E, March 10th, 1892, W. H. S., Jr.")

WITNESS.—The wheat covered by the different bills of lading and different certificates of insurance was in the form of separate lots in the ship, and were kept separate in treating the cargo, and in the subsequent sale and disposition of the same.

After the *Liscard* arrived in distress in Boston, I went on there and saw the wheat in question, and am able to state that all of the wheat was damaged. I have made out a statement of the amount of the libellant's loss as we claim it to be in the case of the Manheim Insurance Company and served it upon the agents of the Manheim here, and upon comparing it with the copy attached to the answer filed by the Manheim Insurance company, I find the copy to be correct.

I also made out a statement of our claims against The London Assurance, and served it upon their agents in Philadelphia, and I find the copy of the same attached to the answer in that case to be correct, with the exception of the item for general average on cargo, which should be $3331.28, instead of $13,331.28: the sum total, $10,451.28 is correct.

These totals include our claim for general average and also our claim under the "sue and labor clause" of the policies.

The sums we claim to be due under the "sue and labor clause" of the policies are not included in the claim which we have made for general average. You will see in the general average account which I have here and copies of which were served upon the insurance companies, that very large items for expenditures in the care, safe-guard and preservation of the damaged wheat in Boston are not adjusted as general average, but are made special charges against the cargo. These items, therefore, and which are very large, are not included in the claims as made for general average. For instance, there is a bill of the Boston Tow Boat Company on

It is agreed that the above affidavit may be read in evidence with the same effect as if the deponent had been regularly called and examined as a witness in the cause.

Depositions taken by agreement in the above-entitled cases on behalf of the libellants, at the office of Messrs. Lewis & Tilton, No. 430 Walnut Street, Philadelphia, Pa., upon Thursday, March 10, 1892, at 3 o'clock, P. M.

Present.—Messrs. Lewis & Tilton, for libellants.
Morton P. Henry, Esq., for the respondents.

R. Winder Johnson, being duly affirmed according to law, testified as follows:

Mr. Henry.—For what purpose is this witness called?

Mr. Tilton.—For the purpose of meeting allegations made by the answers in the cases, particularly with reference to the interests of the libellants in the cargo and in the insurance; and also as to the condition in which the cargo was shipped; also the damage to the cargo, not in detail but in general.

Witness.—I am a member of the firm of Lawrence Johnson & Company, of Philadelphia, exporters and importers of merchandise generally, commission merchants and bankers. We have been in business in Philadelphia since 1870. We have among other places agents in Lisbon for the sale of grain, petroleum and other American products. We have had an agency there since about the end of 1876. We have been in the business of exporting grain and petroleum about the same length of time—since 1876. It is also a part of our business to purchase grain on commission for foreign account. In this case we sold the grain shipped aboard of the steamer *Liscard* to the libellants. We have been paid for the grain. The payment was made in the usual way by credits opened in our favor with London bankers, upon which credits we drew,

and were in that way paid for the cargo. When the cargo was aboard of the *Liscard* it was the property of the libellants, and was at their risk. It was shipped on their account. The bills of lading for the cargo were made out in our own names as shippers, and were by us endorsed in blank. These are the bills of lading—the original bills of lading—which I now produce. These were returned to me afterwards.

(The bills of lading are marked "Libellants' Exhibits, 'B' and 'C' respectively, January 28, 1891, W. H. S., Jr.," these being the first and third sets of bills of lading.)

I also produce our copy invoice book, which contains a press copy of the original invoices for the wheat in controversy.

The original invoices have not been returned to us, and I cannot therefore produce them, but I know these to be accurate and true copies, and it appears from these invoices that the cargo at the time of the shipment was invoiced for account of and consigned to the libellants in this case.

(Mr. Henry consents to the use of a copy of these invoices instead of the book itself.)

WITNESS.—I am able to testify that the wheat shipped under these bills of lading to the libellants was in good condition at the time of this shipment from this certificate of inspection by the Official Inspector of the Port of New York. These certificates are the evidences everywhere accepted by the trade as to the grade or quality of the wheat and its good condition.

(Witness states that he will produce the certificates of inspection, if upon the trial they are required by Mr. Henry.)

WITNESS.—I also produce two certificates of weight, as they are called in the trade, showing the quantity shipped on board the *Liscard*. These show the three separate lots under the three separate bills of lading and the same is true also of the inspector's certificate as to grade and quality, and they will be produced if required by Mr. Henry.

We insured the wheat covered by the bills of lading in evidence in this case, being the wheat in controversy in these suits, by the request of the libellants and for their account. The premiums were paid by the libellants and in the invoice the premium will be found at the foot charged against the libellants.

We made the insurance for the libellants and on their account and by their direction and at their expense; the certificates were issued in our names as shippers because that is the usual course of trade. We always do so.

I produce the original certificate of insurance issued by the Manheim Insurance Company, of Manheim, Germany, dated December 12, 1890, for $10,000, on 33,000 bushels of wheat in bulk, and 1542 bags valued at $40,887, shipped on board the steamer *Liscard* at and from New York bound for Lisbon, Portugal.

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(These certificates are offered in evidence by the libellants, and marked "Libellant's Exhibits, D & E, March 10th, 1892, W. H. S., Jr.")

WITNESS.—The wheat covered by the different bills of lading and different certificates of insurance was in the form of separate lots in the ship, and were kept separate in treating the cargo, and in the subsequent sale and disposition of the same.

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I also made out a statement of our claims against The London Assurance, and served it upon their agents in Philadelphia, and I find the copy of the same attached to the answer in that case to be correct, with the exception of the item for general average on cargo, which should be $3331.28, instead of $13,331.28: the sum total, $10,451.28 is correct.

These totals include our claim for general average and also our claim under the "sue and labor clause" of the policies.

The sums we claim to be due under the "sue and labor clause" of the policies are not included in the claim which we have made for general average. You will see in the general average account which I have here and copies of which were served upon the insurance companies, that very large items for expenditures in the care, safe-guard and preservation of the damaged wheat in Boston are not adjusted as general average, but are made special charges against the cargo. These items, therefore, and which are very large, are not included in the claims as made for general average. For instance, there is a bill of the Boston Tow Boat Company on

page 134 of the general average adjustment, for the discharging, separating, bagging, storing, re-handling, putting in lighters the damaged grain, and for other work and labor in the safe-guard and preservation of the damaged grain. One item of their claim is for $440.00, of which only $315.77 is put in general average, and $3977.23 is charged as a special charge on the cargo.

Here is an item on page 129, which is for the claim of the Grand Junction Elevator for elevating, delivering, storing and re-handling of the cargo, for the purposes of drying and re-conditioning it, all of which was necessarily done for its preservation. This item of the Grand Elevator is for $549.39, all of which in the average adjustment is made as a special charge on cargo, and no part of it made general average.

On page 131 are various inspection charges for inspection of the grain, which are made in the average account special charges on the cargo. There are other charges of large large amount.

Here is one of John O. Foerring as a grain inspector, for $1183.94, all of which is made in the adjustment as a special charge on the cargo. We claim to recover these expenses incurred in the care, preservation and safeguard of the wheat after its arrival damaged in Boston, under the sue and labor clause of the insurance policies in these cases, and these claims are separate and distinct from our claim for general average under the policies, and are stated separately in the account which I have rendered to the insurance companies.

(Mr. Henry states that he reserves the objection and right to cross-examine Mr. Johnson as to these points as he shall think proper.)

(Copies of invoices for those shipments, marked "Libellant's Exhibit E and F, March 10, 1892, W. H. S., Jr.," and offered in evidence.)

By MR. TILTON:

Q. Please state whether the cargo of the *Liscard*, including the wheat in suit in these cases, was surveyed in Boston after the ship's arrival there in distress, by the chairman of the Committee on Grain of the Boston Chamber of Commerce, by the Inspector of Grain of the Boston Chamber of Commerce, and by the Chief Inspector of Grain of the Philadelphia Commercial Exchange, and if so, whether the surveyors made a report of such inspection?

A. They did; the cargo was then surveyed and a report was made by the surveyors, a copy of which was sent to us at the time.

Q. Please state whether this is the original (handing paper to witness) signed by the surveyors?

A. It was; I identify Mr. Foerring's signature, as I know it. That is the original.

(Certificate marked "Libellant's Exhibit 'G,' March 10, 1892, W. H. S., Jr.," and offered in evidence.)

WITNESS.—I also produce the certificate of the Board of Underwriters of New York, dated New York, December 11, 1890, showing that the steamer *Liscard* had completed her loading of the wheat under the inspection of that bureau and has conformed to all the rules of the Board of Underwriters of New York, offered in evidence and marked "Libellant's Exhibit 'H,' March 10, 1892, W. H. S., Jr."

Q. What would have been the condition of this grain, in your opinion, if it had been sent forward to Lisbon in its damaged condition without being discharged from the steamer *Liscard* upon her arrival in Boston, and without the discharge, separation and repeated handling in the elevator, and without such other labor and expense in the saving and preserving of the wheat as was bestowed upon it in Boston at large expense?

(Objected to by Mr. Henry.)

A. Ruined or totally spoiled.

Q. From your knowledge of the Lisbon market can you

state whether grain in such a condition as it would have arrived would have been of any value or not from your knowledge of the Lisbon market?

(Objected to by Mr. Henry.)

A. I can. I have already stated that I have been doing business there since about the end of 1876; that I have been to Lisbon myself a number of times; that I know nearly all the importers and millers in Lisbon, Portugal, personally; that I also have it in my letters from Lisbon that there is positively no use in Lisbon for a damaged grain. It is unsalable there, and from my experience in years I find that if the wheat is not extra well cleaned, if there is a little dust in it, they object to it. They are much more particular than any other market in Europe. I can show you the reason for this, that there is a very heavy duty, something like fifty or sixty cents a bushel, on whatever is delivered, and, naturally, they don't want to pay for dust and dirt.

Q. Well, do you know what disposition they make of badly damaged grain? To what use do they put grain that arrives there in a badly damaged condition?

A. I know that in previous years some grain has arrived there, which the authorities have not permitted to be landed, and they have allowed the receiver to re-export it to England. Other lots have arrived there which they have delivered to a guano factory gratis, the owners of the wheat even paying the expenses of lightering it to the guano factory, and in still other cases I know that the grain has been carried to sea by the authorities and dumped into the high sea; that the Lisbon authorities never allow such damaged grain to go out of their sight. There were a couple of cases that I know of. I think the steamer *Conceptione* went there in 1884, and her cargo was sent right to the guano factory, a total loss to the owners; they paid, besides, the expenses of delivering it to the factory.

Q. Have you brought with you the two short forms of particular average clauses in use by maritime insurance companies?

(Objected to by Mr. Henry.)

A. I have.

Q. How are these clauses put upon the certificates in these cases? How are they usually put upon them?

A. They are usually stamped on the insurance certificates. They are stamped upon both of these certificates—on the certificate of the Manheim Insurance Company and the certificate of The London Assurance. I have the two forms which are used here stamped upon this small slip of paper, which I produce.

Q. These clauses are alike with the exception of the words "caused by"?

A. Yes, sir.

Q. With the exception of the use of the words "caused by," in one form, and the omission of those words in the other form?

A. Yes, sir. The one clause reads:

"Free of particular average unless *caused* by stranding, sinking, burning, or collision."

And the other clause reads:

"Free of particular average, unless the vessel be stranded, sunk, burned, or in collision."

(Mr. Henry objects.)

(This small piece of paper is marked "Libellants' Exhibit I, March 10th, 1892, W. H. S., Jr.," and offered in evidence.)

Q. How many policies were there on the whole cargo of wheat on board of the *Liscard?*

A. Six.

Q. What have become of the claims on the other policies?

(Objected to by Mr. Henry.)

A. Settled.

Q. What proportion of the cargoes of wheat and other cargoes which you ship abroad do you insure?

A. Nearly all; we insure nearly all; but where we don't

insure, the buyers on the other side cover themselves by insurance.

Q. In your business do you use both forms of this clause?

A. We have.

CROSS-EXAMINATION.

By MR. HENRY:

× *Q.* With what companies have you insured with the first clause—the "caused by" clause?

A. We have insured in the Insurance Company of North America, and they still use both.

× *Q.* Any other companies?

A. I don't recollect our having insured in any other company with that clause.

× *Q.* I mean with the "caused by" clause?

A. Not ourselves, although I know other people who have.

By MR. TILTON:

× *Q.* And do you know insurance agents using them?

A. Yes, sir.

By MR. HENRY:

× *Q.* Will you give me their names?

A. Mr. Mather, of the British and Foreign, uses both of these clauses, and he has insured this year in both ways. Wreaks & Loines. I don't know what their custom is. They offered either form, and have remarked that this is a better clause than the "caused by" clause.

By MR. TILTON:

Q. Explain what you mean?

A. We systematically for several years have refused to do business on any but the clause on the certificates in the *Liscard* cases; where companies have tendered us the "caused by" clause, we have rejected it.

By MR. HENRY:

×*Q.* Does this apply to The London Assurance and the Manheim?

A. Using both clauses?

×*Q.* Yes, sir.

A. I can't tell you. I haven't asked them. I would remark probably because they are English companies, and the clause which we use is termed the "English clause."

×*Q.* While I object to the statement of the settlement on the other policies without giving the settlement, you do not mean to say they were settled in full on their policies?

A. I don't mean to say that they were settled in full.

×*Q.* In the adjustment you presented, certain charges of Lawrence Johnson and Company are included, are they not?

A. Yes, sir.

×*Q.* The returns of the sales of the cargo, they appear also in the adjustment you presented, do they not—the return of the sales of the cargo—the account sales of the cargo?

A. Yes, sir; the proceeds realized from the sale of the cargo are shown in the average adjustment.

×*Q.* In the returns of the proceeds there is a charge of two and a half per cent. commission by Lawrence Johnson & Company on sales in addition to the brokerage, is there not?

A. Yes, sir.

×*Q.* That is a claim that you claim also?

A. That is a claim which we make, and believe it to be customary.

×*Q.* And you also make a further claim of $1500 for services independent of commissions, and $250 expenses, something like $1750?

A. The exact figures I can't say. There is an independent charge which I also include in the statement for different services.

×*Q.* As I understand you, in your judgment, you say the expenses incurred at Boston for reconditioning the cargo were necessary. Is that what I understand you to say?

A. Yes, sir; the expenses for the reconditioning were necessary. I would say that.

×*Q.* After being reconditioned, by far the greater portion of the cargo was in a sound condition for shipment?

A. I couldn't call it sound. It wouldn't be called sound by the grain trade.

×*Q.* But it was fit for shipment?

A. It could have been, probably, without becoming more seriously damaged.

×*Q.* And in fact, do you not know the larger part of it was afterwards re-shipped?

A. Yes, sir; it was not to Lisbon.

×*Q.* Shipped where?

A. Most of it was sent to Great Britain, where they take almost all of our bad grain.

×*Q.* The proportion of unmerchantable grain appears by the price in the account sales in this book (referring to Average Adjustment) and all the services are included in this book, are they not?

A. Yes, sir.

It is agreed that the certificates of insurance offered in evidence were issued in Philadelphia under the policies of the Manheim Insurance Company and The London Assurance Company now produced, and are marked "Libellant's Exhibits 'J' & 'K' March 10, 1892, W. H. S., Jr."

R. WINDER JOHNSON, being recalled, Saturday, April 16, 1892, was further cross-examined.

By MR. HENRY:

×*Q.* This voyage was broken up under an agreement signed in Boston, dated the twenty-eighth day of February, 1891, was it not?

A. Yes, sir; that is correct.

(Mr. Henry calls for and offers in evidence agreement to terminate the voyage, contained on pages 25, 26, 27 and 28 of the Adjustment.)

(Objected to by Mr. Tilton as immaterial.)

× *Q.* The London Assurance policy was for $20,000 on 33,000 bushels of wheat, 3,000 in bin 1, and 30,000 in bins 3 and 4, valued at $40,887?

A. Yes, sir.

× *Q.* There was co-insurance on this lot in what company?

A. The International Marine Insurance.

× *Q.* The recapitulation of sales of wheat at page 51 of the adjustment of general average and special charges of the steamer *Liscard*, prepared by Johnson & Higgins, is correct?

A. Yes, sir; it is. The particulars will be found on the preceding pages. The date is not the date of the sale but the date of the warehouse receipt. The sales were made after the voyage was broken up.

× *Q.* Now, lot No. 1 in the recapitulation is the lot insured under the policy of The London Assurance?

A. Bills of lading No. 1; yes, that is correct.

× *Q.* The gross proceeds of these 32,714.48/100 bushels were $29,642.68?

A. Yes, sir.

× *Q.* And the net proceeds were $28,554.15?

A. Yes, sir. This includes deduction for storage, lighterage, brokerage, elevator charges and marine insurance; also commission to ourselves of 2½ per cent. for making the sales, $740.12, making the total charges, $1088.53. I wish to explain that these charges (pages 48, 50, 51 of the average account) were incurred while the grain was in the hands of Lawrence Johnson & Company and after the delivery of the cargo to us under the agreement of February 28. None of these charges are included in the bills of Peter Wright & Sons, or other charges against the cargo stated in detail in the average account.

The insurance of The Manheim was on 33,000 bushels of wheat, valued at $40,887 in bulk, and 1452 bags. Co-insurance of $9262 was in The International, and in The Western Assurance Company, $21,625. This is what we call No. 3 bill of lading covering 22,838 bushels of wheat in bin 1, and 10,161.05 bushels of wheat in bulk and 1542 ship's bags sewn with grey twine in bins 3 and 4, making a total of 33,000 bushels.

The proceeds of the sale are $28,957.04 gross; the net proceeds are $27,581,25. The total charges (pages 48, 50, 51 of the average account) after separation of the interests as I have referred to in my former answer in regard to The London Assurance, were $1375.79. That is the deduction for lighterage, storage, commissions to Lawrence Johnson & Company, marine insurance and brokerage, were expenses incurred after the cargo was delivered into the possession or hands of Lawrence Johnson & Company, and a like commission of $723.21 was also incurred in the other case. These expenses for storage, lighterage, elevator charges, etc., do not appear among the charges in the average account.

(Mr. Henry offers that all the surveys made be put in evidence without proof for whatever they are worth, as if the witnesses were themselves called, and if the surveys had been regularly proven.)

×*Q.* Lisbon is a very bad market for everything except very sound wheat, is it not?

A. Yes, sir; very bad for anything but sound wheat.

×*Q.* The political difficulties between Portugal and England you had in view in breaking up the voyage?

A. Slightly so. I should say that these considerations were rather for the ship than ourselves as representatives of the owners of the wheat.

×*Q.* Except also a cargo by an English vessel?

A. Not the cargo, but any claim they might have against the vessel.

RE-EXAMINATION.

By MR. TILTON:

Q. The charges made by Lawrence Johnson & Co. of $1500 is for your services in looking after the wheat while in its damaged condition and extended for how long a period from the ship's arrival?

A. In looking after the interests of the cargo owners from the time the ship returned in distress until we finally got possession of the cargo first, and then after that until the sale of it, and this charge is additional to the commision mentioned, to which I have already referred in the actual sale of the wheat.

Adjourned.

Exhibit "G."

BOSTON CHAMBER OF COMMERCE.

Alden Speare, President.
Wallace F. Robinson, Vice President.
Fredk. N. Cheney, Treasurer.
Wm. Herbert Parson, Secretary.

BOSTON, January 16, 1891.

We, the undersigned having been called upon by Capt. F. Campbell, of British Steamer *Liscard*, acting as Agent of all concerned, to make surveys on cargo of Wheat discharged from above steamer, recently arrived at Boston in distress, having inspected the Grain at various times during unloading and after discharge, do report as follows.

We proceeded on board Barges *A. Carlton* and *Lorena* and Lighters No. 2, No. 3, No. 4, *Panchite* and *Briar* now lying at the Port of Boston, and in which the cargo of Wheat from said steamer is now stored and found as follows:

We find that all of the cargo, consisting originally of about eighty-eight thousand (88,000) bushels of Wheat, is in a more or less damaged condition, some of it has been

LIGHTER "PANCHITO"

Wheat from No. 1 & 2 Hatches of S. S. *Liscard*		
Trans to B. & A. Elevator Bins 132, 142, 162, 172	14,630,50	"
Note; 13 bags filled with damaged grain unfit to go in Elevator		

BARGE "LORENA"

Wheat from No. 2 Hatch aft of S. S. *Liscard*		
Trans to B. & A. Elevator Bins 128, 148, 158, 173, including 833 red twine bags 'tween decks	14,026,20	"
		BL-1
Trans to B. & A. Elevator Bin 179 including 749 grey twine bags ex *Carleton*	2,697	Bus
Trans to B. & A. Elevator Bin 134 including 42 empty grey twine bags ex *Carleton*	1,049,10	"
Note; 9 bags filled with damaged grain unfit to go in Elevator.		

BARGE "A, CARLETON"

Wheat from No. 1, 2, 3, & 4 Hatches of S. S. *Liscard*		
Trans to B, &, A, Elevator Bins 127, 147, 157, 177 including 84 red twine bags	7,373,30	Bus
Trans to B, &, A, Elevator Bin 164 including 1025 red twine bags	3,729,10	
Trans to B, & A, Elevator Bin 161 ex Bags & bulk including 1037 grey twine bags also 458 filled from Holds also 49 empty bags believed red & grey	1,417,10	
Note; bal of cargo damaged & unfit to go in Elevator, Total quantity weighed & stored in B, &, A Elevator	67,930,10	

Damaged grain unfit to go in Elevator weighed through B, &, A, Elevator ex barge *A Carleton* & stored in barge *Lorena* 5405,40 Bu & 2259,40	7,665,20	"
Total quantity weighed by B, &, A, for storage therein & in *Lorena*	75,595,30	"

LIGHTER "BRIAR"

Damaged and caked wheat unfit to go in Elevator from No. 1, 2, 3, 4, Hatches *Liscard* estimated	4,500	"
Trans similar wheat Feb 16th '91 from Lighter No. 4 estimated	1,150	"
Total estimated quantity described wheat stored in *Briar* Est	5,650	"

LIGHTER NO. 2 FOR STORAGE

Damaged wheat unfit to go in Elevator from *A. Carleton* & Lighter No. 4 estimated	7,800	Bus
Total estimated quantity damaged wheat stored in *Briar* & No. 2	13,450	"

SUMMARY

Stored in B, & A, Elevator Weighed	67,930,10	Bus
Stored in Barge *Lorena* "	7,665,30	"
Stored in Lighter *Briar* Estimated	5,650	"
Stored in Lighter No. 2 "	7,800	"
Grand total of cargo ex *Liscard* weighed & estimated	89,045,30	Bus

Respectfully submitted

Deputy Inspector in charge during handling of cargo & now Acting Chief Inspector of Grain Boston Chamber of Commerce Boston Feb 19th 1891.

A. M. KENNEDY,
Acting Inspector Grain
Boston Chamber Commerce.

thoroughly saturated with sea water, and has thereby sustained very great damage, while the remaining portions are emitting a bad odor, evidently through contact with the badly damaged Wheat and from sea water.

In our opinion none of this Grain should be reshipped in its present condition to original destination, and as there are no facilities for reconditioning Grain at this port, and further delay will be likely to involve heavy increase in the expense to all concerned as well as further serious depreciation in the value of the Wheat, we recommend that the entire cargo of Wheat be sold to the best advantage for all concerned.

DANIEL D. MORRIS
Chairman of the Committee on Grain
Boston Chamber of Commerce.

CHAS. E. ROBINSON
Inspector of Grain,
Boston Chamber of Commerce.

JOHN O. FOERING,
Chief Inspector of Grain,
Philadelphia Commercial Exchange.

Exhibit "I."

Free of particular average, unless caused by stranding, sinking, burning, or collision.

Free of particular average, unless the vessel be stranded, sunk, burned, or in collision.

Libellant's Exhibit by Agreement No. 1.

Boston
Chamber of Commerce
Grain Inspection Office
A. M. Kennedy Act.

Inspector

Statement of grain discharged from British S. S. *Liscard* in Crafts of the Boston Tow Boat Co. stored therein and discharged therefrom into Boston & Albany Grain Elevator at Grand Junction Boston and into Crafts of the Boston Boat Co. from December 30th 1890 to February 16th 1891.

LIGHTER No. 2

Wheat from No. 2 & 3 Hatches of S. S. *Liscard*

Trans to B, & A, Elevator Bins 133, 138, 163, 168, 9,793,40 Bus.

Note; 22 Bags filled with damaged grain unfit to go in Elevator

LIGHTER No. 3

Wheat from No. 3 & 4 Hatches of S. S. *Liscard*

Trans to B, & A, Elevator Bins 139, 169 8.763,10 "

Note; 7 bags filled with damaged grain unfit go in Elevator

LIGHTER No. 4

Wheat from No. 1, 2, 3, & 4 Hatches of S. S. *Liscard*

Trans to B. & A. Elevator Bins 146,171, 4,450,10 Bus

Note; 4450,10 blown by floater *Egypt*. 215 lbs 3 Bags blowings. 54 bags filled with damaged grain unfit to go in Elevator.

Libellant's Exhibit by Agreement, No. 2.

CERTIFICATE OF LOADING.

No. 3700. BUREAU OF INSPECTION
OF
THE BOARD OF UNDERWRITERS OF NEW YORK.

NEW YORK, Dec. 11, 1890.

THIS IS TO CERTIFY, That the Br. Str. *Liscard*, whereof Campbell is master, of 1240 tons measurement, built at North Shields in 1880, bound for Lisbon, has completed her loading at this port under this inspection, and has conformed to all the rules of the Board of Underwriters of New York in relation thereto.

GRAIN HOLDS INSPECTED AND PASSED AS PER PASSES.

PARTICULARS OF CARGO LADEN.

Cargo consists of 76,988.55 bushels wheat, bulk.
11,011 " " bags.

Total, 88,000 equal to 2,359 tons.

Draft of water loaded, 21.5 forward, 21.8 aft. Freeboard, 5.00½/12 ft.

H. S. NURING, *Surveyor.*

COMPANHIA DE MOAGENS DO BARREIRO *vs.* THE LONDON ASSURANCE. — U. S. D. C., E. D. of Pa., No. 8 of 1892.

SAME *vs.* MANHEIM INSURANCE COMPANY. — U. S. D. C., E. D. of Pa., No. 9 of 1892.

Additional Evidence for Libellant.

THOMAS DUNCAN MOFFET, being duly sworn according to law, deposes and says:

Q. Please state your business and what experience you have had upon the sea?

A. I am a master mariner, and am now in command of the British steamer *Brookfield*, of Newcastle, England. I reside in Sunderland, England. I have been following the sea since 1860, a period of thirty-five years. I have been a master mariner for twenty-three years, having received my master's certificate in 1869. I have had command of sailing ships as well as steamships and also of auxiliary ships.

Q. Do you know the British steamship *Liscard*, and are you familiar with the construction and management at sea of steamships or of her class?

A. Yes, sir; I am. My steamship, the *Brookfield*, is one of the same class. I know the steamer *Liscard;* she is an iron ship having enclosed bulwarks of the same kind that all other vessels of that class are provided with. Her bulwarks are of plate iron well stayed above the deck. They are built up solidly the same as any other portion of the ship's side to a height of about four feet or four feet six above her deck. The appearance of the bulwark portion of the ship, looked at from the outside, is the same as any other part of the side. The bulwarks are an important and essential part of the hull of the vessel and are put there for the protection of everything that is upon the deck of the ship and to keep the water off the deck and hatches. The bulwarks break the sea, and protect the hatches and cargo. By far the larger number of iron freight steamers are built with bulwarks; all vessels of her class and with her freeboard require bulwarks.

Q. Are not some freight steamers built without bulwarks?

A. Yes; but they are flush deck steamers, having a great deal more freeboard than the *Liscard* would have if her bul-

warks were taken away. The line of the upper deck on these steamers and the height of the upper deck above the water would be fully the height of the top of *Liscard's* bulwarks. Their high upper deck is rather an additional sea protection to the protection afforded by the bulwarks. It, of course, costs money to build the bulwarks on the ship, and if they were not of some use they wouldn't be put there. They are now under the new construction of flush deck ships to make them safer, giving them forecastle head with bulwarks for additional protection.

Q. Do you consider the bulwarks a part of the hull of the ship?

A. Certainly. They are put on by the builder; they are a part of the hull of the vessel and are built by the shipwright in constructing the hull and are part of the design of the vessel when she is modeled.

Q. Are there any openings in the bulwarks as generally built?

A. Yes; there are scupper holes and chock holes for putting out mooring lines and sometimes ports with doors. These doors are, of course, closed while the vessel is at sea. They are hung on hinges from the top. The water which would be taken in at the other holes, under ordinary circumstances the scuppers of the ship would allow to drain off the deck. The chock holes for putting the ropes out are closed at sea also. Vessels are fitted with wooden chocks which fit the chock holes, and are held in place, closing the chock hole, by a screw bolt and nut. I have been on a steamer with low bulwarks, not high enough to keep off the seas, and had the tarpaulins and hatches washed off, and if we had higher bulwarks the sea could not have struck the hatches, and the vessels that do not have them are differently built, and uniformly have more freeboard; it is always so. My ship wouldn't be allowed to go to sea without bulwarks, unless she was given a good bit more freeboard. I have had a large experience with steamers at sea, in nearly every quarter of the world. I ran eight years in the trade to India through the

monsoons. I have traded in the Black and Mediterranean seas, and in the North American, South American and Pacific coast trade.

Sworn to and subscribed before me this sixteenth day of May, A. D. 1892. } T. D. MOFFETT.

JOHN F. LEWIS,
Notary Public.

WELBURN BLAND, being duly sworn according to law, deposes and says:

Q. What is your business and what vessels are you now in command of?

A. I am a shipmaster and am at present in command of the British steamer *Camden*. My experience has been principally on steam vessels and in all parts of the world. The Australian trade, New Zealand, China and Japan, Mediterranean and Black seas, North and South Atlantic and Pacific coast.

Q. Have you ever had command of a vessel—I mean a steamer of the *Liscard's* class?

A. Yes; my present steamer, the *Camden*, is one of her class. The only difference between my ship and the *Liscard* is that the *Liscard* has a short poop aft filled in and I have on my steamer a deck house aft. The bulwarks are about the same on my vesseel as on the *Liscard*.

Q. Do you know what bulwarks are for?

A. Yes; they are for the protection of the deck houses, crew and the hatches and the hatch covers and everything about the deck. I have had several experiences showing the use and importance of bulwarks. I mean where they were for the safety of the hatches and crew. The bulwarks break the force of the sea and keep the larger part of the water off the deck. The bulwarks on my ship are braced from the deck in the same way as upon the *Liscard*, and it has

been done the same in all the ships I have been in. The iron plates are carried up above the line of the deck, inclosing the bulwarks in solidly around the ship. Above the first line of iron plates in the bulwarks, the plates are a little less in thickness. We wouldn't be able without bulwarks to keep the tarpaulins on the hatches. For further protection they have built a bridge on my ship like that on the *Liscard* to protect the engine room.

Q. Are some freight steamers not provided with bulwarks?

A. There is a class of old ships, twenty-five or thirty years old, without bulwarks, but you see very few of them coming across the Atlantic or in that trade without bulwarks. The vessels without bulwarks are flush deck ships with more freeboard than bulwark ships. They generally have an open rail around, which you wouldn't call bulwarks at all. Well, I should say that very few of these flush deck vessels without bulwarks are being built now; at least, I have not seen them.

Q. To what part of the vessel do the bulwarks belong?

A. They are a part of the hull. You certainly wouldn't call them a part of her equipment, or outfit.

Q. Are there any openings in the bulwarks on these steamers, and are they kept open or closed at sea?

A. We have mooring pipes in our bulwarks and when at sea they are plugged up. Everything is closed against the entering of the sea on the weather side. The iron square ports in the bulwarks on the weather side are always fitted with doors hinged from the top which are closed and prevent the sea entering the deck. That is the rule and practice on all vessels to keep the holes and openings in the bulwark closed at sea, with the exception, of course, of scuppers.

Sworn to and subscribed before me this seventeenth day of May, A. D., 1892. } W. BLAND.

JOHN F. LEWIS,
Notary Public.

JAMES PATTIE, being duly sworn according to law, deposes and says:

Q. What business are you in, Captain, and what has been your experience at sea in command of vessels, and what classes of vessels?

A. I am a British shipmaster, and have held my certificate as master seven years from the English Board of Trade. I reside in Glasgow, Scotland. I am now master of the British steamer *Strathdee*, now in this port from Hamburg. I have been following the sea thirteen years. I have had command of ships, iron steamships in the West India trade, in the East India trade, the China and Japan trade and in the North Atlantic trade. The ships I have commanded have been of different classes, all of them merchant steamships.

Q. Did you ever have command or are you familiar with the construction of vessels of the class to which the steamer *Liscard* belongs?

A. I have had command of bulwark ships, but not one of the exact class to which the *Liscard* belongs. I have had command of a steamer with considerably more freeboard and bulwark protection than the *Liscard* had, and I am familiar with the management at sea of bulwark steamers and know of the purpose and use of bulwarks on vessels. The steamer *Strathdee*, of which I am now in command, has bulwarks carried to a line with her topgallant forecastle, which is about eight feet above the deck, and for additional protection a kind of a half-deck about ten feet broad is built in from the top line of the bulwarks.

Q. Please explain the uses of bulwarks on vessels of the *Liscard's* class and on such other vessels as have them?

A. The bulwarks are put there for the protection of the deck fittings and hatches. They are a part of the essential construction of the ship. A sea striking the side of the ship would have its force broken by the bulwarks and in that way protect the hatches and deck fittings. The bul-

warks are entirely indispensable on the class of vessels to which the *Liscard* or my present steamer belong.

Q. Are some freight steamers built without bulwarks?

A. Yes, but they are the exceptions. They are what are called flush deck vessels, with much additional freeboard to vessels of the *Liscard's* class. I was in command of one of these, and after she was built we had bulwarks put upon her for additional protection. She was called the *Rio Bueno.* She had six feet freeboard before the bulwarks were put on, and the bulwarks were raised three feet six in addition. On these flush deck vessels the line of the upper deck would be fully as high or higher than the top of the bulwarks of the *Liscard.* I know that they are now building a class of freight steamers, which formerly and would still be classed as flush deck ships, but they now put upon them for additional protection a bulwark above the deck. The usual construction of all of these bulwarks to which I have referred is to carry up the first line of iron plate above the deck of the same thickness as the plate in the other portion of the ship's side and then to continue up with iron plating, a little lighter in thickness, very little lighter. The almost invariable rule is to brace and stay the bulwark from the deck. I do not remember any instance where the frames of the ship were run up above the line of the deck. The bulwarks from the outside of the ship would appear the same as any other portion of the ship's side.

Q. Are bulwarks a part of the hull?

A. Certainly, they are. They are a part of the first construction of the ship, with very few exceptions where they are put on afterwards.

Q. What are the usual openings in bulwarks, and state whether they are opened or closed at sea?

A. Everything is closed to the action of the sea and to prevent the sea getting in excepting the scuppers. The chock holes for putting out the mooring lines are provided with wood chocks which fit the holes and they are secured by a

toggle inside. This is always so. The ports in the bulwarks are hinged from the top and are always closed against the entrance of the sea.

Sworn to and subscribed before me this seventeenth day of May, A. D. 1892. } JAMES PATTIN.

JOHN F. LEWIS,
Notary Public.

CURTIS TILTON,
JOHN F. LEWIS,
Proctors for Libellant.

Depositions.

PHILADELPHIA, April 29, 1892.

Parties met on this day at 3.20 o'clock p. m., in the office of Morton P. Henry, Esq., No. 288 Bullitt Building.

Present—MORTON P. HENRY, Esq., CURTIS TILTON, Esq., Proctors.

THOMAS CONDON, sworn.

By MR. HENRY:

Q. You reside in New York, and you came on here to give this testimony?

A. Yes, sir.

Q. Were you in December, 1890, the Lloyds' Surveyor of hulls?

A. Yes; in the port of New York.

Q. Are you a practical shipbuilder?

A. Yes, sir.

Q. You made a survey of the steamer *Liscard*, did you?

A. I did.

Q. At the request of who?

A. At the request of the captain.

Q. Who called upon you for that purpose?

A. Who called upon me for that purpose.

Q. Where was the vessel lying at that time?

A. At her wharf in Brooklyn—loading wharf.

Q. Can you describe the wharf?

A. She was at an elevator, I think, there.

Q. Does your memory enable you to tell what day it was?

A. It was on Saturday, that I am sure of, and some time in December, 1890.

Q. Describe what the character of the damage was?

A. I have not my notes by me and I will have to trust to memory. One or two of the bulkhead plates, on the port side abaft the bridge, were bent and cracked. I think a stanchion was bent, but I am not quite sure. I could not say what else besides: very little, if anything.

Q. Did you make a report upon her?

A. I made a written report, which the captain had; that is the last I saw of it. I will send a copy of it from New York, which can be attached to my deposition.

Q. To what effect was that report?

A. Simply describing these damages, and, I think, that the repairs could be deferred until the vessel arrived home, as they did not in any way affect her efficiency or sea-going qualities.

Q. Could the amount of water that would have come through that crack have affected the cargo?

A. No; none whatever. All the water possible might have passed through it, but it would not have affected the ship at all.

Q. Could as much water have come on deck through that crack as would come in a heavy rain storm?

A. Nothing like it; nothing approaching it.

Q. Or when washing down the deck with the ship's hose?

A. More water would be put on the deck in that way than would come directly through the opening in this bulwark.

Q. Were the bulwarks of the *Liscard* a part of the structural frame of the ship?

A. No; they were not.

Q. Describe them?

A. The bulwarks were attached to the upper edge of what is called the sheer strake, and above the waterway angle iron. The real structure of the vessel ends at the upper part of this angle iron, the bulwark being clear of it altogether.

Q. If the whole plate had been carried [away] bodily would it have affected the efficiency of the ship?

A. None whatever.

Q. Or its capacity?

A. No; not at all. The only effect would be the discomfort on deck for those moving about.

Q. You see a great number of your vessels? Your business requires you to see a great number of vessels?

A. Yes, sir.

Q. Do all the vessels carry bulwarks?

A. Some have open bulwarks and others closed, as these are.

Q. What do you mean by open bulwarks?

A. I mean with stanchions and rails at the side.

Q. Tramp vessels of the class of the *Liscard?*

A. Some have and some have not.

Q. What is the reason for discarding bulwarks?

A. One of them, and the principal reason is, in the event of shipping a sea the water is quickly carried off the deck. Probably that is the principal reason why that is so.

Q. Describe what is the purpose of the bulwark of a vessel?

A. The purpose of the bulwark of a vessel is nothing more or less than for the protection of those who are on the deck, working about the deck. It does in some degree, of course, keep out the light seas, spray water and so on, but it has nothing whatever to do with the safety of the ship. I have known sometimes when a vessel has been rather in danger by these bulwarks.

Q. Under what circumstances?

A. Seas have come on board and have broken away the bulwarks.

(Objected to by Mr. Tilton, unless the witness is speaking from his own personal knowledge.)

I am speaking of the effect of seas that I have witnessed. I have seen the seas come on board and carry away the bulwarks, and to such an extent as to start even some of the overdeck. That is an extreme case. I have known such.

Q. That is to say, the water was retained inside the bulwarks and forced the bulwarks out?

A. From the washing and swashing of the water we can easily comprehend that the power of it would knock the bulwarks right out.

Q. Was the crack in these bulwarks above the deck?

A. Oh, yes, considerably; some inches at any rate.

Q. Did you see any blow received to the side of the vessel itself?

A. No; I did not.

Q. Have not even vessels with bulwarks openings in the bulwarks necessarily?

A. Yes; called bulwark ports.

Q. How large are they?

A. Two feet square, some I see.

Q. For the purpose of what?

A. Relieving the deck of water that comes on board.

Q. When a vessel is fastened with hawsers at the wharf what openings do those pass through?

A. They pass through what we call wharfing chocks, iron casings fixed on the side of the vessel through which the rope passes. There is an opening where the rope passes through.

Q. Could the amount of water that would come through that crack amount to the volume that would come through the openings which you have described?

A. Nothing like it. I have drawn a section of the frame of the *Liscard*, showing how the bulwarks were fastened; that is to the best of my recollection. It is not drawn to a scale; it is only a rough sketch.

(Witness produces sketch referred to, which is annexed hereto, marked "Apr. 29/92, P. R. B.")

CROSS-EXAMINED.

By MR. TILTON:

× *Q.* State what experience you have had at sea in connection with steam vessels like the *Liscard?*

A. I said just now I was not a ship captain. I am a practical shipbuilder.

× *Q.* Have you had any experience in command of a steam vessel at sea?

A. No.

× *Q.* What is the name of your shipbuilding firm?

A. I have been out of it for these six and thirty years.

× *Q.* While you were a shipbuilder what class of vessels did you build?

A. In those days they were mostly of wood.

× *Q.* Your building was of wooden vessels I presume?

A. Mostly. Iron was just coming in then. I had been surveying iron ever since.

× *Q.* For what trade were the vessels that you built intended?

A. Not for any particular trade.

× *Q.* Foreign or domestic?

A. Where I was brought up was in the government service, and, therefore, they were built for any particular trade.

× *Q.* What do you mean by "brought up in the government service"?

A. Trade as shipbuilder—that is where we built ships.

× *Q.* You mean in some navy yard?

A. Yes, sir.

× *Q.* You never were in the business of building ships as a member of a firm or on your personal account?

A. Oh, no.

× *Q.* In your opinion, was the steamer *Liscard* in a seaworthy condition when you surveyed her?

A. Perfectly.

× *Q.* The square ports which sometimes occur in the bulwarks of a ship are provided with doors, or means of closing them, and are kept closed at sea, are they not?

A. Not always; it is not wise to do that.

× *Q.* Answer the first part of the question: Are they provided with doors or means of closing them?

A. Yes, sir.

× *Q.* And whether they are kept closed at sea would depend upon the conditions of weather and sea and storm, would it not?

A. I should think so.

× *Q.* Do you not remember in looking at this crack that it showed clear indications of being pushed in-board. I mean that the broken plates indicated a severe blow which had pushed them in-board—in that direction?

A. At the crack, of course they were. That cracked the plate.

× *Q.* Do you know the distinction between flush deck ships and well deck or poop deck ships?

A. I think so.

× *Q.* The ships which are not provided with closed bulwarks are flush deck ships, having their upper deck high and having a greater freeboard than vessels provided with closed bulwarks. Is not that correct?

A. That is not the reason for it.

× *Q.* What is the fact involved in the question?

A. That is by no means general; that is not always so. Ships that have poops and forecastles and bridges have open bulwarks in the same way.

× *Q.* What about the level or height of the deck above the sea or freeboard?

A. It does not affect the freeboard at all, whether bulwarks are open or whether they are closed.

× *Q.* Do you mean to say that a vessel with scarcely any freeboard, or with proportionally small freeboard, would be as likely to be constructed with open bulwarks as with closed bulwarks?

A. A vessel with open bulwarks, having the same freeboard as a vessel with closed bulwarks, is just as efficient, just as good in every way, except the people on board may not be as comfortable when water or a sea comes on board.

×*Q.* What would be the cause of that?

A. The water would have freer access to the deck, that is all.

×*Q.* In your opinion, is a ship whose deck is more largely flooded with sea water in as safe condition as to seaworthiness as a vessel that has less sea water on her deck?

A. It does not affect her safety at all to have open bulwarks.

RE-EXAMINED.

By MR. HENRY:

Q. How long have you been a surveyor of Lloyds?

A. Thirty-six years I have been with our people.

Q. How many iron steamers do you examine in the course of a year? Give me the smallest number.

A. I should think one hundred and fifty. I think that is rather within than excessive.

Q. It is a part of your business to keep yourself acquainted with the construction of steamers?

A. Yes; I do nothing else.

Q. You have seen the government torpedo boats, have you not?

A. Yes, sir.

Q. They have no bulwarks?

A. No, sir.

Q. How far are their decks above water?

A. A foot or a foot and a half, I should think. I know it is very low. I have just finished surveying a vessel, just half the size of the *Liscard*. She has come out from London to Bermuda, and from Bermuda to New York. She has open bulwarks from end to end, with just division marks for the houses. I merely name that to show that the safety of a vessel does not depend on whether her bulwarks are open or closed. I have known of instances where closed bulwarks have been a detriment.

Q. You have seen the effect of that many times?

(Objected to.)

A. I have seen the effect of it; I have had to survey the damages where the bulwarks have been carried out.

RE-CROSS-EXAMINED.

By MR. TILTON:

×*Q.* The torpedo boats you have referred to are not designed for open sea service, are they?

A. I should think so. I know that torpedo boats are carried out to sea by men-of-war and they must certainly be intended to operate in the open sea. Suppose they meet an enemy?

×*Q.* These boats are designed to be carried on deck by men-of-war?

A. Yes; I have seen them one hundred feet long. Lloyds' Register of British and Foreign Shipping is an institution in London established there a great many years ago, I forget how many, for the purpose of surveying and classification of ships and for the issuing of the registry recording all these surveys and classifications, as a guide to marine insurers, charterers, and merchants that deal in shipping matters. Then they established of course a staff. Whether a ship is insured in London or Amsterdam or Paris we have nothing to do with.

(Signature waived.)

William S. Samuels, being duly sworn, says: I am a marine surveyor at Philadelphia for *Bureau Veritas*, for the classification of vessels. I have been an officer of several steamships. My business requires me to be familiar with the construction of iron and steel steamships.

The bulwarks are not a part of the hull of all vessels; they are put up around the sides of the main or upper deck as a shelter for the crew and those required to be on deck in heavy weather at sea. Many modern steamships are now constructed without bulwarks; their place is supplied by an

open railing along the upper decks. In very severe weather, when the waves come over the rails of the bulwarks, the latter retain the water on deck until it runs off through openings left for that purpose.

The weight of the water causes vessels to labor more heavily, and there is danger of injury to those on deck from articles getting loose washing about the decks.

In vessels having open rails instead of bulwarks the decks are immediately cleared of water which comes on deck, and for that reason they are preferred.

I have read the affidavit of B. F. Candage in reference to the break in the port bulwark of the *Liscard*. Such a break would not allow a sufficient quantity of water to come through it as to affect the cargo of that vessel if the hatches were properly closed and secured.

The waves striking the bulwark at the break would wet the deck, but not more than by a rain shower or by washing the decks down with the hose or with buckets of water.

The wetting of the deck through such break as is therein described is insignificant compared with that caused by waves coming over the rail of the bulwark, which is a frequent occurrence at sea in bad weather.

WM. S. SAMUELS.

Sworn to and subscribed before me, this twelfth day of March, 1892.

J. F. WALLACE,
Notary Public.

John Haug, being duly sworn according to law, deposes and says: I am a marine architect and surveyor for Lloyds' Register of Hulls and Machinery at Philadelphia. I know the steamship *Liscard*. The bulwarks of some steamships are not part of the construction of the hull. Many modern steamships are without bulwarks, having in place a railing of iron rods to protect the men on deck.

I have read the affidavit of B. F. Candage. Such a break in the bulwarks would not be of the slightest importance, so far as the water coming on deck is concerned. There are scuppers at the bottom of the bulwarks of all vessels, which are always, and must be, left open, which would admit quite as much, and even more, water than could come through such a break in the bulwarks of the *Liscard* as described in that affidavit when the waves dashed against the hull. All vessels with bulwarks also have hawse holes for the anchor chains, and openings called chocks for the passage of hawsers, warp, and ropes through the bulwarks. These openings would admit far more water than could come in through such a break as is described.

As a surveyor, I should not consider for a moment that there was any necessity for requiring repairs of such a break No damage to cargo could be occasioned by such a break.

The water spurting through such a break, when struck by a sea, could not have done more than wet the decks, but not more than would be caused by a shower of rain.

Sworn to and subscribed before me, this sixteenth day of March, 1892. } JOHN HAUG.

J. F. WALLACE,
[SEAL.] *Notary Public.*

JOHN W. SHACKFORD, being duly sworn according to law, doth depose and say: I am at present marine superintendant of the International Navigation Company, at Jersey City. I have been both an officer and master of steamships. I was for many years an officer on steamships of the White Star Line, and was master of the steamship *Illinois*, of the American Line.

I am acquainted with the manner of construction of iron and steel steamships. The bulwarks are not a part of

the hull of all vessels. They are put up around the sides of the main or upper deck as a shelter for the crew and those required to be on deck in heavy weather at sea. Many of the finest and most modern steamships are now constructed without bulwarks; their place is supplied by an open railing along the upper decks. In very severe weather, when the waves come over the rails of the bulwarks, the latter retain the water on deck until it runs off through openings left for the purpose.

The weight of the water causes vessels to labor more heavily, and there is danger of injury to those on deck from articles getting loose washing about the decks. In vessels having open rails instead of bulwarks the decks are immediately cleared of water which comes on deck, and for that reason they are preferred.

I have read the affidavit of B. F. Candage in reference to the break in the port bulwark of the *Liscard*. Such a break would not allow a sufficient quantity of water to come through it as to affect the cargo of that vessel, if the hatches were properly closed and secured.

The waves striking the bulkwark at the break would wet the deck, but not more than by a rain-shower or by washing the decks down with the hose, or with buckets of water.

The wetting of the deck through such break as is therein described is insignificant compared with that caused by waves coming over the rail of the bulwark, which is a frequent occurrence at sea in bad weather.

Sworn to and subscribed before me, this twelfth day of March, 1892. } J. W. SHACKFORD.

JOHN RODGERS,

[SEAL] *Notary Public.*

(Copy.)

LLOYDS' REGISTER OF BRITISH & FOREIGN SHIPPING.

NEW YORK DISTRICT.

15th DECEMBER, 1890.

This report must bear only the signature of Surveyors to Lloyds' Register of Shipping.

This is to certify that Thomas Congdon the undersigned Surveyor to this Society did at the request of Captain Campbell survey the screw steamer *Liscard* of London for the purpose of ascertaining the damage stated to have been sustained through having been run into while lying at her loading wharf, Brooklyn.

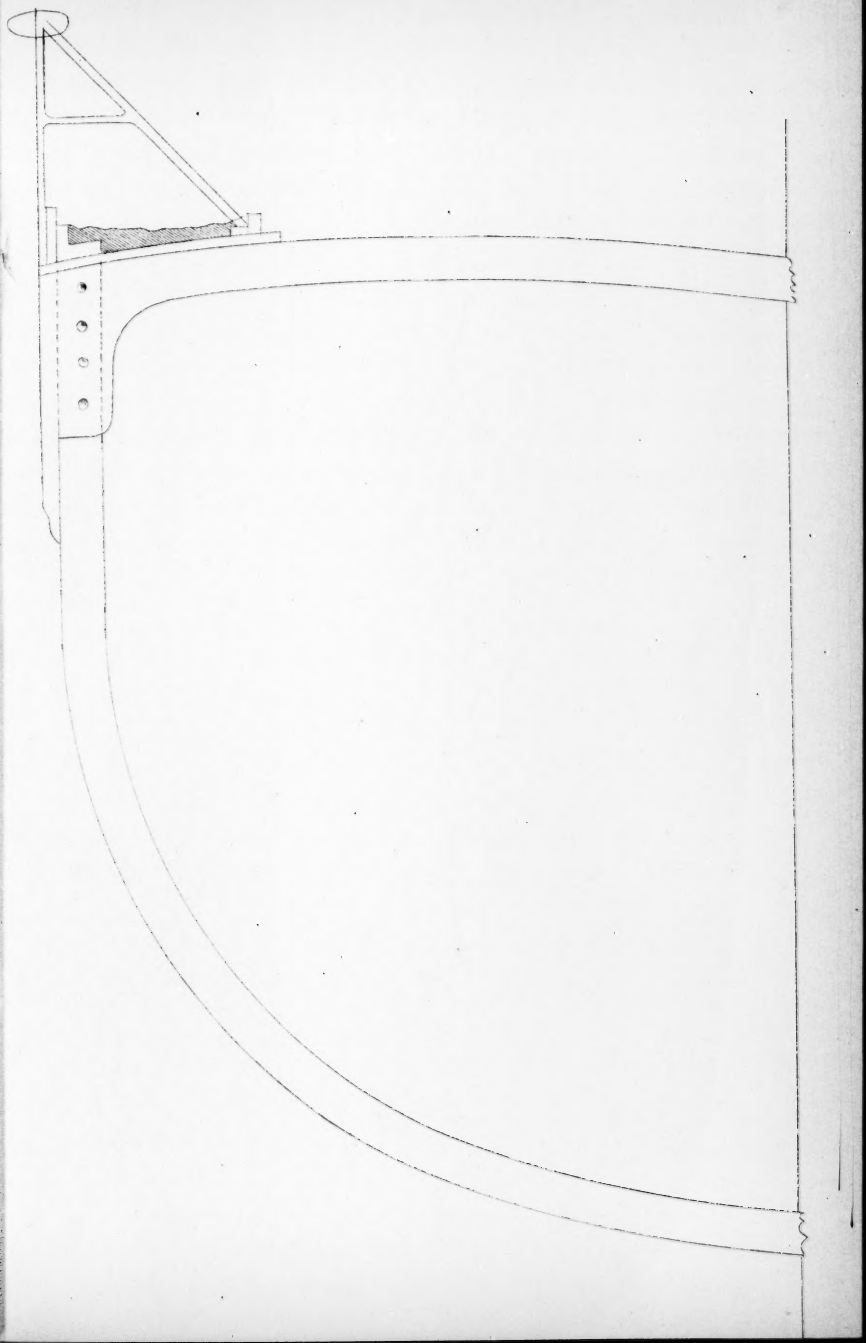
On examination it was found that two bulwark plates in the way of main rigging on the port side were badly bent and broken and one bulwark stanchion bent.

The following repairs being required:

To disconnect and lift the main rail in the range of the damage, remove the broken plates and replace them by new; to remove the damaged stanchion repair and replace the same; to repair the main rail, and complete the other fittings in way of the plates as before.

THOS. CONGDON.

Fee $20.



COMPANHIA DE MOAGENS DO BARREIRO *vs.* THE LONDON ASSURANCE.	No. 8. Of 1892.
SAME *vs.* THE MANHEIM INSURANCE COMPANY.	No. 9. Of 1892.

ADDITIONAL AFFIDAVIT ON THE PART OF RESPONDENT.

CHARLES NEWMAN MUMFORD, being sworn, says:

I have been a shipmaster for fifteen years, and I am now port captain of the Earn Line Steamship Company, and see a great number of steamers of all characters, and I believe I am perfectly well acquainted with the construction of steamers of all kinds. I have commanded well decked vessels having bulwarks, and I have commanded vessels with flush decks and rail.

The steamship *Stephensons*, which I commanded for five years, was a flush deck vessel, with about five feet freeboard.

I have also commanded the steamship *North Anglia;* she was a three-island steamer, with poop, bridge and forecastle. She had bulwarks about three feet six inches high, and a freeboard about 4 feet 6½ inches.

I commanded the *Earnwell,* which is also a three-island steamer of very much the same class, with bulwarks. She had 4 feet 3 inches freeboard.

Also the *Earndale,* same class of vessel, with bulwarks.

I do not think bulwarks are a protection to the hatches; on the contrary, I think the danger to the tarpaulins covering the hatches is greater in vessels with bulwarks than those

having rails. For this reason vessels with bulwarks when they take in water retain it on deck sometimes for a considerable time—as much as half an hour and over. When one sea follows another the decks are continually full of water, especially with a beam sea, which the port and scuppers cannot clear. It is the swash of the water on deck as the ship rolls which has a tendency to lift the tarpaulins, while a sea coming on board a vessel with rails runs right off. So that in the whole time that I was in a spar deck vessel I have never lost the tarpaulins off the hatches, but many times in vessels with bulwarks I have lost them, and felt the ship was in danger. Between vessels with bulwarks and vessels without there is, in my opinion, no comparison with regard to the safety of the hatches. All vessels with bulwarks have wash ports besides scuppers. The ports are about 2 feet 6 inches by 1 foot 6 inches, as an average. They open outwards so as to let the pressure of water pass through from side to side in very bad weather.

A vessel like the *Liscard* must have ports, but I cannot recall her. This fact every shipmaster must know.

A crack in the bulwarks is a most unimportant thing, and is often seen. We have several ships now with cracks in the bulwarks from 3 feet and upwards, caused by the iron tubs.

The bulwarks of steamers, so far as I have seen, are not part of the frame. They are made of lighter material, and with stanchions inside to fasten them to the deck. In vessels with rails round the sides of the ship the water runs off quickly. In vessels with bulwarks the side of the ship goes up stronger to the deck, that is to say, to the bulwarks, which is of lighter construction than the hull of the ship; they keep the water off in moderately bad weather, and keep it on deck in very bad weather, or, when seas follow each hoter on board the vessel, faster than the ports can carry it off.

I calculated once, though of course only approximately, that I had two hundred and fifty tons of water on the decks

of the *North Anglia*, caused by a succession of seas and a very heavy gale, and the safety of the ship was seriously imperiled. This would not have occurred if the ship had rails instead of bulwarks.

Although I have seen the *Liscard*, I cannot recall anything about her, but the following is a description of her taken from Lloyds' register: She has two decks, poop 28 feet long, bridge 13 feet long, and forecastle 32 feet long; freeboard, 4 feet 10 inches.

Sworn to and subscribed before me, this 25th May, 1892.
JOHN RODGERS,
[SEAL] *Notary Public.*

C. N. MUMFORD.

RESPONDENT'S EXHIBITS.

AGREEMENT TO TERMINATE VOYAGE.

THIS AGREEMENT, made at Boston, in the Commonwealth of Massachusetts, this 27th day of February, A. D. 1891, between the Owners and Master of the Brit. S. S. *Liscard*, by E. V. Convers, their duly authorized agent thereto, parties of the first part, and Messrs. Lawrence Johnson & Co., of Philadelphia, Agents for owners of Cargo, by Curtis Tilton, their duly authorized Agent thereto, parties of the second part, *Witnesseth*—

WHEREAS, The Steamer *Liscard* sailed from New York for Lisbon, Portugal, in December, 1890, with a cargo of grain destined for that port and shipped by Lawrence Johnson & Co.;

AND WHEREAS, The said steamer has put into Boston in distress with her cargo damaged, and both parties consent that the voyage shall be broken at Boston, and the cargo there delivered to the parties of the second part on terms below stated.

Now therefore, in consideration of the mutual promises of the respective parties hereto it is agreed:

First.—That the parties of the first part will surrender (on or before March 3, 1891, at 3 o'clock p. m.) to the parties of the second part upon their proper receipt therefor, the entire cargo of wheat lately discharged from the S. S. *Liscard* and now in Boston, the same to be free of all liens against it created by any act of the parties of the first part, said surrender to be upon the following conditions, to wit:

Second.—That the parties of the second part simultaneously with the surrender of said cargo will pay to the parties of the first part the sum of thirty-six hundred dollars in full settlement of freight on the entire cargo.

Third.—That said parties of the second part simultaneously with the surrender of said cargo as aforesaid, will give to the master and owners of the said S. S. *Liscard* a bond in the sum of fifteen thousand dollars for the payment of all proper and legal special charges on said cargo paid or incurred on account thereof, by said steamship, her owners or agents, and will also, further to secure the payment of such special charges, deposit in a Philadelphia trust company which is responsible and mutually satisfactory, the sum of twelve thousand dollars payable to the joint order of Peter Wright & Sons, of Philadelphia, and Lawrence Johnson & Co., the same to be applied to the payment of such special charges when agreed upon or determined by suit upon said bond or otherwise, and after the payment of said charges the balance, if any, to be repaid to said Lawrence Johnson & Co.

And they will execute a proper bond in the customary form to cover all expenses chargeable against said cargo in general average.

And will surrender to the parties of the first part for cancellation, one bill of lading of each of the three sets issued by said steamer for said cargo, and for any duplicate bills of lading outstanding and not produced they will give a proper

bond executed by a Philadelphia trust company, to be approved by the parties of the first part, to indemnify the said steamship, her owners, master and agents against all claims that may be made under said outstanding bills of lading. The said bond to be cancelled upon the subsequent production of all or accounting to the satisfaction of the parties of the first part for the non-production of the remaining bills of lading.

Fourth.—That this agreement is without prejudice to the rights of the parties of the second part to libel said steamship in an action to recover such damages as they may claim said cargo has suffered, from an alleged wrongful act or default of her master or owners, or any one representing the said steamship in the premises, and the entire security to be demanded in such action or actions shall not exceed the sum of fifteen thousand dollars, which security the party of the first part undertake to give before the sailing of said steamship in the form of a bond or stipulation, with sureties to be approved as to form and sufficiency by the libellants or by the Court, according to the course of practice in the United States District Court for the district of Massachusetts.

Finally it is stipulated that time is the essence of this agreement and that the same shall be carried out without delay.

In Witness Whereof, The parties hereto, by their respective attorneys thereunto duly authorized as aforesaid, have set their hands and seals in duplicate at Boston, in the Commonwealth of Massachusetts, this twenty-seventh day of February, A. D. 1891.

(Signed) THE OWNERS AND MASTER OF THE
BR. STEAMER "LISCARD,"
By
E. B. CONVERS,
Attorney.

LAWRENCE JOHNSON & CO.,
By
CURTIS TILTON,
Attorney.

Signed, sealed, and delivered in }
in the presence of: }

FREDERICK DODGE,
EUGENE P. CARVER.

The said Peter Wright & Sons and Lawrence Johnson & Co., do hereby personally bind themselves to the true and faithful performance of this agreement.

(Signed) LAWRENCE JOHNSON & CO.,
PETER WRIGHT & SONS.

2/28/91.

ABSTRACT FROM SURVEY ON VESSEL.

LLOYDS' REGISTER OF BRITISH AND FOREIGN SHIPPING.

PORT OF BOSTON, MASS., December 27, 1890.

This is to certify that Oliver L. Shaw, the undersigned Surveyor to this Society, did, at the request of Captain Campbell, Master of the S. S. *Liscard*, of London, and Francis Peabody, Lloyds' agent, survey said vessel for damage alleged to have been caused by high gales and heavy seas on destined voyage from New York to Lisbon; put into this port 24th December with the high pressure engine disabled, decks swept, boats gone, sluice valves choked and other damage. See Log Book and Protest, and report as follows: Find forward part of bridge stove, starboard side of bridge stove and started, upper bridge standards bent and started, house to steam steering gear started, window gratings broken part gone, steam steering gear damaged, hand wheel loose on shaft, pipes to steam steering gear engine bent and broken, fore and aft bridges both sides stove and part gone, starboard side of engine house bulged in and started. Engine skylight started, decks strained, started and leak into the engine room, one accommodation, one side, and one rail ladder destroyed, two boats

gone, including outfits, gripes, chocks, etc., one port boat stove and broken at the chocks, gripes gone and chocks damaged, on starboard side one bulwark plate cracked and broken, one plate bent and started, six port doors gone, hinges broken, five port doors bent, hinges and fastenings broken, cabin skylight windows smashed, gratings broken, after wheel box smashed, poop deck started and strained, leaking into the cabin ; ventilator to tunnel gone, three side bunker hatch tarpaulins, 2 thwart ship, and 1 each to No. 1, 2, 3 and 4 hatches, torn and destroyed, forecastle deck strained and leaky, also the main deck from the forecastle to the poop leaky, awning spar broken, copper steam pipe to winches bent and broken, chairs and covers ripped up from the deck, bent and broken, the exhaust pipes broken and part gone, water service pipes broken and damaged.

The high pressure cylinder piston rod bent, valve face that bolts to cylinder in steam chest broken, eccentric strap and rod twisted and bent, ballast donkey piston broken, suction pipe broken, out-board valve spindle broken to fill ballast tank. Indicator pipes broken, donkey boiler on main deck, door and hinges broken, four lugs to grate bar ring broken off, five grate bars broken. Sluice cocks in coal bunker to forward hold pipes broken. Sluice cocks to after hold choked with grain, pipes broken and boxes filled with grain.

Recommend that all the damage sustained during the late voyage be repaired, and losses made good to the hull and machinery. The bridges and fittings to be repaired and deck caulked, ladders furnished, steering gear repaired, house repaired, two new boats furnished complete and one repaired, starboard bulwark plates repaired, furnish 6 new port doors and repair others damaged, repair cabin skylight, and furnish wheel box and ventilator to tunnel, tarpaulins to hatches, repair winch pipes and covers, service pipes, and pipes to steering engine, caulk main deck, poop and forecastle decks other damage to be repaired and made good. High pressure piston rod to be straightened, new face piece to valve seat put

in. Eccentric strap and rod straightened and put in order, ballast donkey piston put in, pipe repaired. Spindle to outboard valve and cover to be renewed. Donkey boiler repaired. Sluice cocks, pipes, caps to deck and the boxes repaired and put in order to forward and after holds, indicator pipe and other damage to machinery to be put in good working order.

BOSTON, January 20, 1891.

Having this day made my final survey on the hull and machinery of this vessel I find my recommendations have been carried out, and the repairs completed to my satisfaction.

(Signed.) OLIVER L. SHAW,

Lloyds' Ship and Engineer Surveyor.

SUPPLEMENT TO ANNEXED REPORT.

BOSTON, July 20, '91.

The port side bulwark plates near amidships two of which are broken, and caused by collision in New York Harbor, one boat missing and stated lost on the voyage from Hamburg to New York, and the high pressure engine crank shaft repaired at Bombay, remain subject to the recommendations of the survey and report held recently at New York by Surveyors Messrs. Congden and Haug, viz., to be repaired and surveyed on return to the United Kingdom and within six months from the date of their report.

(Signed.) OLIVER L. SHAW,

Ship and Engineer Surveyor.

FIRST SURVEY ON CARGO.

BOSTON CHAMBER OF COMMERCE,

BOSTON, January 8th, 1891.

This is to certify that we visited the Br. S. S. *Liscard* from New York to Lisbon, arriving at Boston, December 24th, 1890, in distress, and on examination of grain on said steamer we found it more or less damaged, and accordingly recommended the Master and agents to discharge same into lighters, with a view to separating the sound from the damaged grain, and ascertaining the amount of each.

(Signed) CHAS. E. ROBINSON,
Inspector of Grain Boston C. of C.

SECOND SURVEY ON CARGO.

We, the Port Wardens and Surveyors for the Port of Boston, duly appointed, certify that we went on board the British Steamship *Liscard*, from New York bound to Lisbon with a cargo of wheat put into this port in distress, having broken a portion of the machinery and sustained other damage to the ship, some of the tarpaulins having been washed from the hatches, and a quantity of sea water gone down in the cargo below, the water courses on the bottom being choked up, so that the water could not come to the pumps.

Found the hatches protected with four good tarpaulins, and on removal found the wheat badly wet and much heated.

Recommend that it be discharged as soon as possible so as to separate the damaged portion from the sound.

And we declare that the damage done to the aforesaid merchandise and loss is in consequence of dangers and perils of the seas, heavy laboring of the ship during the exceedingly bad weather met with on the voyage and causes above mentioned, not from any fault of the stowage or want of due care, that we could discover.

In Testimony Whereof, we have hereunto signed our names at Boston this ninth day of January, A. D. 1891.

(Signed) DANIEL BAKER,
EDGAR LINCOLN,
J. S. ATTWOOD,
HORACE N. BERRY,
DAVID PLUMER,
Wardens and Surveyors.

THIRD SURVEY ON CARGO.

BOSTON CHAMBER OF COMMERCE,

BOSTON, January 16, 1891.

We, the undersigned, having been called upon by Captain F. Campbell, of the British steamer *Liscard*, acting as agent for all concerned to make surveys on cargo of wheat discharged from above steamer recently arrived at Boston in distress, having inspected the grain at various times during unloading and after discharge, do report as follows:

We proceeded on board the barges *A. Carleton*, and *Lorena* and lighters "No. 2," "No. 3," "No. 4," and *Panchito* and *Briar*, now lying at the port of Boston, and in which the cargo of wheat from said steamer is now stored, and found as follows:

We find that all of the cargo, consisting originally of about (88,000) eighty-eight thousand bushels of wheat, is in a more or less damaged condition; some of it has been thoroughly saturated with sea water and has thereby sustained very great damage, while the remaining portions are emitting a bad odor, evidently through contact with the badly damaged wheat and from sea water.

In our opinion none of this grain should be reshipped in its present condition to original destination, and as there are no facilities for reconditioning grain at this port, and fur-

ther delay would be likely to involve heavy increase in the expense to all concerned, as well *as further depreciation in the value of the wheat*, we recommend that the entire cargo of wheat be sold to the best advantage for all concerned.

(Signed) DANIEL E. MORSS,
Chairman of Com. on Grain.

" CHAS. E. ROBINSON,
Inspr. of Grain B. C. C.

" JOHN O. FŒRRING,
Chief Inspr. of Grain Phila., C. Ex.

BOSTON, MASS., U. S. A., 17th January, 1891.

This is to certify that Daniel D. Morss and Charles E. Robinson, both of whose signatures I believe to be subscribed to the within paper, are recognized grain experts, and competent to pass upon the subject matter of the within survey, and that their statements as such are entitled to full weight and credit.

(Signed) W. H. STUART,
British Vice Consul.

PHILADELPHIA, 20th January, 1891.

This is to certify that John O. Fœring, whose signature I believe to be subscribed to the within paper is a grain expert appointed by the Philadelphia Commercial Exchange, and competent to pass upon the subject matter of the within survey, and that his statement as such is entitled to full credit.

(Signed) ROBT. CHAS. CLIPPERTON,
H. M.'s Consul.

FOURTH SURVEY ON CARGO.

BOSTON CHAMBER OF COMMERCE,
Grain Inspection Office,

BOSTON, Feb. 21, 1891.

We, the undersigned, having been called upon by Captain F. Campbell, of the British steamship *Liscard*, acting as agent for all concerned to re-survey the wheat, *ex* that steamer, now in the elevator of the Boston and Albany R. R. Co. at Grand Junction, East Boston, consisting of about sixty-eight thousand (68,000) bushels of wheat, also about seventy-seven hundred bushels (7700) in barge *Lorena*, which was surveyed by us as per certificate dated Boston, January 16, 1891, do find as follows:

That as a result of the careful handling, separation, extracting of lumpy grain from cool grain, blowing of such grain as considered judicious to have blown during its transfer, various transfers of the wheat through floating elevators to crafts and thence to B. and A. elevator to respective bins therein, and or to said barge *Lorena*, that in our opinion said wheat has been saved from further deterioration in condition, and the general condition of said wheat has been improved considerably by such handlings.

We are further of the opinion that the said wheat, by reason of the above described handlings, is of greater marketable value than when it was surveyed by us in crafts, January 16, 1891.

Respectfully submitted,

(Signed) DANIEL D. MORSS,
Chairman on Committee of Grain, B. C. C.

A. M. KENNEDY,
Acting Chief Inspr. of Grain, B. C. C.

JOHN O. FŒRRING,
Chief Inspector of Grain, Com. Exch. of Philadelphia.

FIFTH SURVEY ON CARGO.

BOSTON CHAMBER OF COMMERCE,

BOSTON, Feb. 28, 1891.

F. CAMPBELL, Master S. S. *Liscard*,

DEAR SIR:—Am in receipt of your communication of 27th inst., requesting a resurvey of wheat ex steamer *Liscard*, now in Boston and Albany Elevator, in barge *Lorena* and in lighters "No. 2" and *Briar*, with a view to ascertain its present condition, and an expression from me as to what portion, or portions, or all of said wheat can go forward to Lisbon in the S. S. *Liscard* without deterioration, or if not, what the percentage of deterioration might be.

In answer to the above, I beg leave to state that I have examined the wheat ex S. S. *Liscard*, now stored in Boston and Albany Elevator, and find as follows:

50,960$^{1}{}_{0}$ bushels in bins 133, 138, 154, 168, 143, 173, 148, 153, 169 to be in fair merchantable condition, being cool, slightly damp and slight smell.

8179$^{2}{}_{0}$ bushels in bins 147, 157, 177 and 156 slightly damp, cool, but not strictly sweet, some damaged grain.

8970$^{4}{}_{0}$ bushels in bins 141, 176, 152 slightly damp, cool, and smell caused by slight mixture of damaged grains.

My opinion, based upon this last, and from previous surveys, is that constant care is required to keep the property from further deterioration, therefore should a shipment to Lisbon be contemplated, would advise the above mentioned lots to be kept in separate holds or bins while in transit, and think by so doing would carry to Lisbon without further deterioration.

The wheat now in barge *Lorena*, 7665 bushels, is in bad condition, being very damp, musty, now cool, but in danger of further deterioration by heating.

The wheat now in lighter "No. 2," about 7800 bushels (estimated), in compartment No. 1, cool, very damp and musty; Nos. 2 and 3 compartments, now warm, very damp

and musty, badly damaged and needing constant handling to retain its present condition ; No. 4 compartment wet, hot and rotten, the whole cargo unfit for shipment.

The wheat in barge *Briar*, estimated 5650 bushels, very bad condition, being wet, hot and rotten, and unfit for shipment.

Respectfully submitted,

(Signed) A. M. KENNEDY,

Acting Inspector of Grain, Boston Chamber of Com.

Statement of Sale of Wheat Discharged from S. S. *Liscard* at Boston, Mass., Sold by Lawrence Johnson & Co., for Account of whom it may concern.

FIRST SET OF BILLS OF LADING, DATED DEC. 8th, 1890

DATE:	NO. OF WAREHOUSE RECEIPT.	BUSHELS.	BINS.	PRICE.	VALUE.
Feby 6	7723	3,098[20]	132, 142, 172, 162	$0 98	$3,036 36
" 6	7716	8,613[40]	168, 133, 138, 163	0 98	8,441 39
" 6	7723	7,778[20]	132, 142, 172, 162	0 98	7 622 93
" 6	7722	4,450[10]	146, 171	0 96¼	4,283 29
" 10	7747	3,729[10]	164	0 96¼	3,589 32
" 16	7751	1,417[10]	161	0 96¼	1,364 02
		29,087			
	Lighters, " Briar,"	988[12]	No. 1	0 15	148 30
	" No. 2,"	2,639[06]	No. 2, 3, 4	0 42[08]	1,119 19
		32,714[18]			$29,604 80
	Add:—				
	Return Fire Premium			$36 12	
	Proportion Screenings			1 76	
					37 88
					$29,642 68
	Less:—				
	Lighterage, " Briar,"		$56 30		
	" " No. 2,"		82 00		
				$138 30	
	Storage			87 39	
	Brokerage			81 79	
	Elevator Charges, " Briar,"		$9 88		
	" " " No. 2,"		26 39		
				36 27	
	Marine Insurance			4 66	
	Commission			740 12	
					1,088 53
					$28,554 15

E. & O. E. (Signed) LAWRENCE JOHNSON & CO.

PHILADELPHIA, April 15th, 1891.

SECOND SET OF BILLS OF LADING, DATED DEC. 10th, 1890.

DATE.	No. OF WAREHOUSE RECEIPT.	BUSHELS.	BINS.	PRICE.	VALUE.
Feb. 10	7737				
" 10	7737½	13,235	128, 148, 158, 173	$0 98	$12,970 30
" 6	7724	791[20]	179, 128, 148	0 98	775 51
" 9	7735	2,652[10]	179	0 98	2,599 12
" 6	7724	44[50]	179	0 98	43 94
		16,723[20]			$16,388 87
	Lighters,				
	" Briar,"	2,442[08]	Bulk No. 1.	0 15	366 32
	" No. 2,"	1,494[47]	Bulk No. 2, 3, 4,	0 42[408]	633 91
		20,660[15]			$17,389 10
	Add:—				
	Return Fire Premiums,			$21 16	
	Proportion Screenings,			1 03	
					22 19
					$17,411 29
	Less:—				
	Storage			$41 81	
	Lighterage, " Briar,"		$138 70		
	" " No. 2,"		46 50		
				185 20	
	Brokerage,			51 65	
	Elevator Charges, " Briar,"		$24 42		
	" " No. 2,"		14 95		
				39 37	
	Marine Insurance,			2 64	
	Commission,			434 73	
					755 40
					$16,655 89

E. & O. E. (Signed) LAWRENCE JOHNSON & CO.

PHILADELPHIA, April 15th, 1891.

THIRD SET OF BILLS OF LADING, DATED DEC. 11th, 1890.

DATE.	No. OF WAREHOUSE RECEIPT.	BUSHELS.	BINS.	PRICE.	VALUE.
Feby 10	7717	8,763^{10}	139, 169	$0 98	$8,587 90
" 10	7739	1,649^{30}	127, 147, 157	0 96¼	1,587 64
" 9	7738	5,724	127, 147, 157, 177	0 96¼	5,509 35
" 6	7723	3,754	132, 172, 142, 162	0 98	3,678 92
" 6	7716	1,180	168, 138, 133, 163	0 98	1,156 40
" 9	7736	1,049^{10}	134	0 98	1,028 18
		22,119^{50}			
	Lighters,				
	"Lorena,"	7,665^{20}		0 80	6,132 26
	"No. 2,"	2,942^{02}	No. 2, 3, 4	0 42^{408}	1,247 66
		32,727^{12}			$28,928 31

Add:—

Return Fire Premiums,	$27 39	
Proportion Screenings,	1 34	
		28 73
		$28,957 04

Less:—

Storage,		$73 73	
Lighterage, "Lorena,"	$270 00		
" "No. 2,"	91 50		
		361 50	
Brokerage,		81 67	
Elevator Charges, "Lorena,"	$76 06		
" " "No. 2,"	29 42		
		105 48	
Marine Insurance,		30 20	
Commission,		723 21	
			1,375 79
			$27,581 25

E. & O. E. (Signed) LAWRENCE JOHNSON & CO.

PHILADELPHIA, April 15th, 1891.

Recapitulation of Sale of Wheat.

No. of Lot.	No. of Bushels.	Gross Proceeds.	Storage.	Lighterage.	Brokerage.	Elevator Charges.	Marine Insurance.	Commission.	Total Charges,	Net Proceeds.
1	32,714[48]	$29,642 68	$87 39	$138 30	$81 79	$36 27	$4 66	$740 12	$1,088 53	$28,554 15
2	20,660[15]	17,411 29	41 81	185 20	51 65	39 37	2 64	434 73	755 40	16,655 89
3	32,727[12]	28,957 04	73 73	361 50	81 67	105 48	30 20	723 21	1,375 79	27,581 25
	86,102[15]	$76,011 01	$202 93	$685 00	$215 11	$181 12	$37 50	$1,898 06	$3,219 72	$72,791 29

And afterwards, to wit: On the twelfth day of May A. D., 1893, the opinion of the Court being read and filed, is in the words and figures following, to wit:

COMPANHIA DE MOAGENS DO BARRIERO,

vs.

THE LONDON ASSURANCE.

THE SAME,

vs.

MANHEIM INSURANCE COMPANY.

I find the libellant's statement of facts to be substantially correct. On December 10, 1890, the libellants, through Lawrence Johnson & Company, of Philadelphia, shipped on board the steamer *Liscard*, at New York, bound for Lisbon, Portugal, 33,000 bushels of wheat in bulk, and 1542 bags, valued at $40,887, and for and at the expense and request of libellants the said Lawrence Johnson & Company insured the said wheat in the Manheim Insurance Company for said voyage, in the sum of $10,000. The wheat was purchased by libellants from Lawrence Johnson & Company, and as soon as loaded on board ship was, by the terms of sale, the property of libellants.

The bills of lading and certificates of insurance were made out in the names Lawrence Johnson & Company, the cargo being deliverable and insurance payable to their order, and the said papers were by them endorsed in blank. The payment for cargo was made through a credit opened by the libellants with London bankers to whom the bills of lading and certificates of insurance went, in passing from Lawrence Johnson & Company to the libellants. The wheat was invoiced to libellants and the premiums for insurance charged against them in the invoice. Another lot of 33,000

bushels of wheat, valued at $40,887, was shipped on the same steamer by libellants, and insured by The London Assurance, for said voyage, for the sum of $20,000, the terms, conditions and manner of shipment and insurance being the same as to both lots, which were separated in the ship, and kept separate thereafter. Excepting as to the amount of libellant's claim, the case against the Manheim Company is the same as that against The London Assurance.

The underwriters are both foreign companies and their method of business is to issue to their American agents open policies of insurance, for account of whom it may concern. Under these open policies their agents issue to the assured short certificates, which stipulate as follows: "This certificate "represents and takes the place of the policy and conveys all "the right of the original policy holder, for the purpose of "collecting any loss or claim as fully as if the property was "covered by a special policy direct to the holder of this certificate."

The certificate and policy taken together contain the contract of insurance. Under the terms of this contract, the underwriters are liable for all kinds of sea peril, losses and damages to the wheat, whether partial or total, except as provided in the following clause:

"Free of particular average unless the vessel be stranded, sunk, burned or in collision."

The *Liscard*, while in the harbor of New York, after the insurances had attached, was run into by a scow or lighter in tow of the *George Carnie*. Before the collision the steamer was fully loaded; her bills of lading had been signed and delivered to libellants, and she had made every preparation to leave port; had cast off her mooring lines for the purpose of starting to sea, but in consequence of some trifling difficulty with her engines she again made fast to the wharf. The collision occurred after thus removing. A break was made by the collision in the enclosed iron side of the steamer above her deck, called the bulwark, of considerable length and open from one and a half to one and a quar-

ter inches a part of the distance. The steamer was duly surveyed before starting out, and pronounced seaworthy. In the course of her voyage she encountered very rough weather, which lasted for several days, and opened the seams of her deck, letting water in upon the wheat. Water passed in also through the hatches, from which canvas covers had been torn by the storm. Eventually her engine gave out under the strain, and she returned in distress to Boston.

The wheat was there discharged, and found to be seriously damaged. Surveyors reported that no part of it was fit for further transportation, and recommended a sale. On February 2d, Lawrence Johnson & Co. and the Master agreed that the voyage should be terminated and the cargo received at Boston. The insurers assented on condition that the rights of neither party to the policies should be affected thereby. The wheat covered by The London Assurance was sold for $28,554.15, which deducted from the valuation, $40,887.00, showed a loss of $12,332.85; while that covered by the Manheim Insurance Co's. policy sold for $27,851.25, which being deducted from the valuation, $40,887.00, showed a loss of $13,305.25. Parts of these balances have been paid by other companies having policies on the cargo.

The libellants rendered services and incurred expenses under the "sue and labor" clause of the policies, for which also they seek recovery. The policies attached while the wheat was in harbor in New York, immediately on loading. In the language employed it was insured "at and from New York and bound for Lisbon."

There is no controversy about the material facts. The single question is one of law, and arises out of the terms of the clause above quoted respecting "particular average," or partial loss. If the question was new it would be embarrassing. It is very old, however, having arisen and been decided in England more than a century ago; and the decision then made has been adhered to without variation ever since. The clause originally was confined to cases of "stranding," but was quickly extended to cases of burning and collision as

well. Its introduction in the peculiar form here found, soon gave rise to litigation, the insured contending that if stranding, burning or collision occurs during the voyage, whether the loss is attributable to it or not, the policy is to be read as if this conditional limitation had been omitted; and the insurer contending that the clause contemplates only such stranding, burning, or collision as causes the loss. The English Courts, after full discussion and consideration, adopted the former view, giving to the language a strict, literal interpretation; and notwithstanding the repeated efforts subsequently made to procure a reversal, the decision has been adhered to with pertinacity and steadiness to this day. Lowndes on Marine Insurance, 319, 320, says: "A stranding at any time during the voyage is sufficient. It is of no consequence whether this causes the damage or not. The injury to the ship may be repaired before the damage to the cargo occurs. A stranding during the voyage (without regard to its consequences) operates to efface the clause from the policy". McArthur on Marine Insurance, 283, 284, 285; Parsons on Marine Insurance, 630, 631, and Arnold on Marine Insurance, say substantially the same. The decisions and the reasons on which they are founded are so fully stated by these authors that it would be a waste of labor to say more about them. In the United States the question has not been raised, doubtless, because parties here have acquiesced in its decision, as stated, elsewhere. However reasonable a different construction of the clause might have been in the commencement, it would be most unreasonable now. As the proofs show, and as would be inferred in their absence, insurers and insured contract with reference to this construction. Where the insurer desires to vary the risk he varies the language (and the premium demanded) accordingly. If he intends to limit his liability for partial loss to cases in which such loss is attributable to the stranding, burning or collision, he says so (and charges a diminished premium). A departure from the established construction now would, therefore, work great injustice to the insured. While paying for one risk he would be

secured against another of less importance. I cannot doubt that the Courts of this country will follow those of England, on this subject. The importance of uniformity in the rules respecting commerce and kindred subjects, in this country and that, cannot be overstated. The circumstance that some differences exist now affords no support for an argument in favor of others: *Buzby* vs. *Phœnix Ins.*

It is not denied that a collision, in the admiralty sense of the term, occurred during the risk, in this case. It is denied, however, that it was *such* a collision as the policy contemplates; because, as is contended, it had not, and could not have, any connection with the loss sustained; and because it occurred at New York. This is, however, I think, the old question, presented under slightly varied circumstances; and the decisions referred to cover it. As we have seen it is of no consequence whether the collision led to the loss, or might have led to it, or not. The contract does not say it shall—to fix the insurers liability for "particular average;" and the strict interpretation referred to was adopted because the language is the insurer's, and because, also, it avoids the danger which must result from groping after unexpressed intentions, and furthermore saves the insured from the necessity of producing proofs such as must always be difficult, so often impossible, of attainment. In many cases the loss may result from previous stranding or collision and leave no evidence of the fact. The visible effects of such accident may be unimportant, and yet the hidden consequences be serious. If this collision had occurred at sea I can hardly believe it would be urged that the policy does not embrace it. If it would, then what description of collision, short of one entailing the loss, is embraced?

The authorities cited show that any accidental stranding, burning or collision, no matter how slight, is within the clause. If the stranding is but momentary, or the burning consumes but slightly any material part of the vessel, it is sufficient. All attempts to find a resting place, or draw a line between the simple occurrence of such accidents and their

occurrence with attendant loss, must lead simply to confusion. Where would the line be placed—by what rule would it be fixed? It has been urged in some instances that the stranding or burning, etc., should be "serious." But what does this term in such connection signify? Not that it shall be serious as respects the loss insured against; that is admitted. As respects the ship all such accidents are serious; they involve her safety and threaten destruction, though she may escape with little injury, or none. And then, again, how is it to be known, as before suggested, that serious hidden injury is not inflicted—such as the tempests alone will develop? It has also been contended that the consequences should be such as to disable the ship and temporarily suspend navigation. But of what importance is this to the insurer, if it has no connection with the loss? And why draw the line here rather than elsewhere? The purpose of the construction referred to was to avoid all such speculation and uncertainty.

Nor does the policy say *where* the collision shall occur. Why, therefore, should we hold that such an occurrence at New York, after the risk attached, is excluded? If it had sunk the vessel, or otherwise injured the cargo there, it would certainly have rendered the insurers liable for a partial loss, which could not be if the collision was not such as the policy contemplates. It is urged that there is a difference between the port risk and the sea risk. The difference, however, is simply in kind. That the insured is not subject to an implied warranty of seaworthiness while in port is immaterial to the question. The contract is entire, and admits of no such division of the insurer's responsibility as is set up. The collision did not affect the vessel's seaworthiness; she was still capable of resisting ordinary storms; and is not therefore blameable for starting on her voyage. Such an accident in port might be sufficiently serious to strain and weaken a vessel so as to incapacitate her to resist extraordinary tempests, without rendering her unseaworthy. Such straining and weakening might be invisible to surveyors, and yet cause the loss of her cargo at sea

I cannot, therefore (and in view of the authorities), attach importance to the fact that the only visible effect of this collision was the breaking of her bulwarks; and that it occurred at New York. But even this effect seems to have contributed to the loss, for according to the proofs, some of the water entered the deck by means of this break and ran through its seams and hatches upon the cargo. True, the damage might have been as great if the break had not existed; for the sea strained the vessel from stem to stern and swept her decks with floods of water. Nevertheless, the fact remains that the break in the bulwark probably, if not certainly, contributed to the damage. The view I entertain of the case, however, renders the fact unimportant. I regard every question raised as covered fully by the decisions above referred to; and do not, therefore, see anything open to discussion except the question whether we are to depart from the uniformly recognized construction of the clause involved, after insurers and insured have conformed their contracts to it; and about this I have no doubt.

A decree must, therefore, be entered sustaining the libel

And afterwards, to wit, on the 18th day of October, A. D. 1893, a decree with order of reference to a commissioner to ascertain and report the damages sustained by libellant, being entered, is in the words and figures following, to wit:

COMPANHIA DE MOAGENS DO BARREIRO *vs.* THE LONDON ASSURANCE.	U. S. D. Ct., E. D. of Pa. In Ad'mt'y. No. 8 of 1892.

And now this 18th day of October, A. D. 1893, on motion of Curtis Tilton, Proctor for libellants, this case having been heard upon pleadings and proofs, it is ordered, adjudged and decreed that the libellants do have and recover of The

London Assurance the amount of their damages with interest and costs, and it is further ordered that the case be referred to Edward F. Pugh, Esq., as Commissioner to assess the damages and to make due report thereof to the Court.

And afterwards, to wit, on the eleventh day of June, A. D. 1894, Edward F. Pugh, Esq., Commissioner, as aforesaid makes his report to the Court and the same being read and filed is in the following words and figures following, to wit,:

IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN ADMIRALTY.

COMPANHIA de MOAGENS do BARREIRO,
vs.
THE LONDON ASSURANCE. } No. 8 of 1892.

SAME
vs.
THE MANHEIM INSURANCE COMPANY. } No. 9 of 1892.

The Commissioner to whom it was referred to assess the damages sustained by the libellants in the above entitled causes respectively,

Respectfully reports,

That on the twenty-fifth day of October, A. D., 1893, and at sundry times thereafter, he was attended at his office, No. 419 Walnut Street, Philadelphia, by Curtis Tilton, Esq., and John F. Lewis, Esq., Proctors and Advocates for Libellants, and by William Parkin, Esq., and Morton P. Henry, Esq., Proctors and Advocates for Respondents.

The proceedings before the Commissioner appear in schedules hereto annexed.

While the suits and the claims thereunder are distinct from each other, they both refer to substantially the same state of facts. The testimony has been taken before the Commissioner, and the arguments had in both jointly, and, therefore, it will be convenient to pass upon both in one report.

On the tenth day of December, A. D., 1890, the libellants being owners of a cargo of 88,000 bushels of wheat on board the British steamship *Liscard*, at the port of New York, procured the same to be insured in several Companies, among which were the Companies respondent, for a voyage at and from the said port to the port of Lisbon, Portugal. The London Assurance insured 33,000 bushels of the cargo shipped under bill of lading No. 1, in $20,000, on a valuation of $40,887, and The Manheim Insurance Company insured 33,000 bushels, shipped under bill of lading No. 3, in $10,000, on a valuation of $40,887.

There was also insurance on the lot shipped under bill No. 1 in The International Marine Insurance Company for $20,887, and on the lot shipped under bill No. 3 in The Western Assurance Company for $21,625, and in The International Marine Insurance Company for $9,262.

The policies were in the usual form, so far as the perils insured against are concerned, and they contained the usual "sue and labor" clause, authorizing and requiring the assured and their agents, to use their endeavors for the defense, safeguard and preservation of the cargo, to the charges whereof the insurers agreed to contribute according to the rate and quantity of the sum insured: other insurance, if any, to contribute proportionally, etc.

The vessel having met with disaster, whereby the cargo was seriously damaged, from causes within the policies, on the twenty-first day of December, 1890, bore away for the port of Boston, Massachusetts, and arrived there on the twenty-fourth day of the same month.

Several surveys were called upon vessel and cargo, the first on the vessel being December 27, 1890, and the first on the cargo January 8, 1891. The cargo having been discharged into lighters for examination, was found to be badly damaged by sea water, and unfit for reshipment in its then condition. A survey held January 16, 1891, recommended that none of the grain be reshipped in its then condition to the original destination, and stated that, as there were no facilities for re-conditioning it at the port of Boston, the surveyors recommended that it be promptly sold for the benefit of all concerned. Arrangements were then made through Messrs. Peter Wright & Sons, acting for the vessel, with the Boston Tow Boat Company and the Grand Junction Elevator, in accordance with which such of the grain as was capable of being so treated was cleansed, separated and generally re-conditioned, so far as possible. A further survey reported February 21, 1891, that as the result of this treatment the wheat had been considerably improved and saved from further deterioration, making it of greater market value than before the treatment.

Negotiations had been pending for the breaking up of the voyage at Boston, and as one result of these negotiations, on February 20, 1891, all of the underwriters on the cargo, (including the respondent Companies) agreed in writing, that the payment of $3,600 freight on the damaged cargo, and the acceptance and sale of the cargo by the owners should be without prejudice to any of the rights or claims the shippers of the cargo might have against its insurers, and should not be considered a waiver or acceptance of, an abandonment, nor should it prejudice any defense that the insurers of the cargo might have under their contract of insurance. It was also agreed that the $3,600 was to be a recoverable item in any claim except for general average: but that notwithstanding, the cargo owners might demand its allowance in general average.

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On February 27, 1891, the agents of the ship entered into an agreement with the agents of the owners of the cargo (both parties acting through their proctors, who were then in Boston), to surrender the cargo to its owners, free of liens, in consideration of the payment of $3,600 as full freight on the cargo; the cargo owners also to give the vessel a bond in $15,000, conditioned for the payment of all proper and legal special charges on said cargo paid or incurred by the vessel, her owners or agents; and, as further security, to pay $12,000 into a trust company, to be applied to the payment of such special charges, when agreed upon or determined by suit. All of the bills of lading were to be produced and surrendered to the ship.

On the next day, February 28, 1891, this agreement was confirmed at Philadelphia by Messrs. Peter Wright & Sons, agents of the vessel, and Lawrence Johnson & Co. agents for the cargo, who personally bound themselves to the faithful performance thereof.

The provisions of this agreement were complied with, the cargo being surrendered, the money deposited, and the bond given in accordance therewith.

On February 28, 1891, a further survey was held on the cargo, which sets forth in detail its condition as found in the bins and lighters. More than one-half of the cargo was found to be in fair merchantable condition, and cool, though slightly damp, and with a slight smell. About 17,000 bushels were in a condition not quite so good, having still a mixture of damaged grains. The opinion was expressed by the Surveyor that constant care was required to keep this last lot from further deterioration, and "should a shipment to Lisbon be contemplated," it should be kept in separate bins while in the transit: the opinion of the Surveyor being that it would then carry to Lisbon without further deterioration. About 15,000 bushels in lighters *Lorena*, and No. 2, were still in a much worse condition; and about 5,650 bushels in barge *Briar*, were in very bad condition, and unfit for shipment.

The cargo was delivered to Messrs. Lawrence Johnson & Co., as agents for the owners, March 3, 1891. Messrs. Lawrence Johnson & Co., having determined not to reship any of the cargo to Lisbon, the greater part of it was sold in Boston, and a small portion, which could not be disposed of there, was brought to New York and sold.

Throughout these proceedings, Messrs. Peter Wright & Sons had been acting in behalf of the vessel, and Messrs. Lawrence Johnson & Co., on behalf of the cargo. The greater part of the expenses, up to the time of the surrender of the cargo, were contracted by Peter Wright & Sons; those incurred afterward were contracted by Lawrence Johnson & Co., who had also, from the time of the arrival of the vessel in Boston, given attention to the interests of the cargo, and supervised the contracts made for its benefit.

This branch of the case will be treated more fully hereafter.

The underwriters on the cargo (not, however, including the respondents herein) had also sent to Boston Mr. Coe, an employee of Messrs. Johnson & Higgins, insurance agents of Philadelphia, with instructions to look after the general interests.

At the request, or with the assent of all parties in interest (except the respondents herein), a statement or adjustment of general average and special charges for the voyage, was made up by Johnson & Higgins, average adjusters of Philadelphia, the statement being dated May 29, 1891.

The amount claimed by Peter Wright & Sons as due them for disbursements and services, as presented on July 16, 1891, was as follows:

Proportion of general average,	4,243 64
Special charge on cargo, less charges in adjustment etc., made by L. Johnson & Co.,	11,930 96
Interest,	938 94
	$17,113 54

In consequence of negotiations between Peter Wright & Sons and Lawrence Johnson & Co., this claim was adjusted at $15,579.37, which was paid by Lawrence Johnson & Co., October 29, 1892. The deduction of $1,450, with interest $84.17, in all $1,534.17, was made from the gross claim, and was not referred to any particular item nor apportioned among the items thereof, nor was there any understanding on the subject; though it appears from the testimony of R. Winder Johnson (Page 89) that at least one cause of their objection to the bill as rendered, was on account of the amount of $3,700, claimed by Wright & Sons as compensation for their own services in the matter.

This payment, and the surrender of the bills of lading, released the $15,000 bond and the $12,000 deposit.

The vessel had also sustained damage; for which she claimed, and was allowed reimbursement in general average.

The libellants state the subjects of their claims against respondents, as follows:

First.—For partial loss upon wheat insured, arising from sea peril damage.

Second.—The charges in general average, and the special charges upon cargo incurred in relation to the cargo, as set forth in the general average account.

Third.—To recover, under the "sue and labor" clause of the policy, for all expenses and charges incurred in the preservation of the damaged cargo, and generally all charges properly recoverable under that clause.

And they aver that under these general heads there is due by The London Assurance (No. 8 of 1892) the sum of $10,451.34, with interest, upon the following statement of account:

There were shipped per 1st. set of bills lading 33,000 bushels grain,		40,887 00
Insurance in International Marine Ins. Co.,	$20,887 00	
The London Assurance Co.,	20,000 00	
	$40,887 00	
There were sold 32,714 48/60 bushels grain. Net proceeds,		$28,554 15
Loss,		$12,332 85
Add charges per adjustment on 1st and 3rd set of B/L. General average on cargo,	$3,331 28	
Special charges on cargo,	13,405 55	
	$16,736 83	
Charge half to set B/L No. 1,		8,368 42
		$20,701 27
Proportion of $1750, special on cargo and owners, on sale of 86,102 15/60 bushels,		664 93
Claim,		$21,366 20
Amount due by The London Assurance Company, with interest.		$10,451 34

Due by The Manheim Insurance Co. (No. 9 of 1892) the sum of $5463.68, upon the following statement of account:

There were shipped by third set of bills of lading thirty-three thousand bushels grain		$40,887 00
Insured in		
Manheim Insurance Company,	$10,000 00	
Western Assurance Company,	21,625 00	
International Marine Insurance Company,	9,262 00	
	$40,887 00	
There were sold thirty-two thousand seven hundred and twenty-seven and twelve-sixtieths bushels:		
Net proceeds,		$27,581 25
Loss,		$13,305 75
Add charges per adjustment on first and third set of bills of lading:		
General average on cargo,	$3,331 28	
Special charges on cargo,	13,405 55	
	$16,736 83	
Charge half to bills of lading set No. 3,		8,368 41
		$21,674 16
Proportion of $1750.04 special on cargo and owners on sale of eighty-six thousand one hundred and two and fifteen-sixtieths bushels,		665 19
Claim,		$22,339 35
Amount due by The Manheim Insurance Company, with interest.		$5,463 68

Counsel for libellants urges the Commissioner to decide that the average adjustment and statement of special charges is conclusive evidence of the matters therein stated.

The Commissioner does not understand this to be the law.

It is true that there are some expressions, both in text books and in reported cases, which might be construed as favoring such a contention, but if the authorities be carefully examined, it will be seen that they do not go to the extent claimed.

Where an average adjustment is properly and legally made, according to the law of the proper place, it is to be observed, but not otherwise.

2 Arnold on Mar. Ins., 6th Edn., 916.

McArthur on Marine Ins., 34.

Parsons on Contracts, 8th Edn., 416.

Marshall on Ins., 542.

It may be conceded that an average adjustment should have great weight in any controversy, as a solemn commercial document, presumably made by a skillful person, and probably correctly made. It might be right to go even further, and treat it as *prima facie* evidence.

But, after all, an average adjustment is a mere calculation and apportionment, made by an accountant, who may or may not determine correctly the propositions of law upon which the calculation depends. An average adjuster is not a judicial officer. He may even (as in the present case) be selected by some of the parties in interest without the assent of the others. Indeed, it is a matter of every day experience that items in average adjustments *are* disputed and frequently modified by underwriters and others, nor do average adjusters always agree among themselves; so that the alleged conclusiveness of the statements is certainly not acknowledged by the business community.

The Commissioner is also asked to report that, as the libellants, owners of the cargo, in good faith and after careful examination, paid the bills and claims made by the shipmaster and his agents, they are entitled to recover the amount so paid.

The Commissioner decides that they are so entitled, provided the bills were such as ought to have been paid, but not otherwise.

Lowndes on Marine Ins., Sec. 202.

Arnould Marine Ins., 6th Edn., 885.

Counsel for the respondents admitted that in the adjustment of general average and special charges, etc., the bills are correctly transcribed and that the calculations are mathematically correct; that the supplies therein mentioned were actually purchased and the services actually rendered; but did not admit for whose benefit the supplies and services were bought and rendered, respectively, nor that the adjustment thereof as made is a correct one.

The adjustment and statement, so far as applicable, is, therefore, taken as a basis for this report.

It apportions the sums charged and expended as follows:

Cargo and owners,	$ 1,750 04
Special charges on cargo,	17,497 65
General average	9,752 98
Vessel and owners,	11,710 46
	$40,711 13

In the settlement, the cargo shipped by these bills was to pay

General average on cargo,	$ 3,331 28
Special charges,	13,405 55
	$16,736 83

The owners of cargo were to pay $1750.04, as above.

The respondents object to the statements of claim of libellants, as herein before set forth, and to some of the items of the average adjustment and statement of special charges. They admit their liability in general average; but aver that, upon the facts as proved, and upon a proper statement of the accounts, The London Assurance should be charged with the sum of $6,869.49 only, and The Manheim Insurance Company with the sum of $3,606.04 only; and that no interest should be added to these amounts.

As the Commissioner understands the contention of the respondents, their points of objection may be grouped under the following heads:

First.—That the voyage should not have been broken up at all; that the cargo should have been reshipped for Lisbon.

Second.—That if it was proper to break up the voyage and sell the cargo, the measure of damage, in estimating the loss on the cargo to be paid by the underwriters, is to be determined by the proportion which the difference between the market price of sound wheat, at Boston, on the days when the sales were made, and the prices actually obtained for this cargo on those days, bears to the valuation in the policies.

Third.—That credit should be given for the sum of $1,534.17, the amount deducted from the gross bill of charges and disbursements of Peter Wright & Sons.

Fourth.—That the services of a watchman on the lighters in which the cargo was stored at Boston were unnecessary, and that the wages paid him ($134) should be disallowed.

Fifth.—That the premiums paid for insuring the cargo on the lighters and in the elevators in Boston were unnecessary, and should be disallowed as against these respondents.

Sixth.—That no part of the sum of $700 paid for the services of Mr. Coe, as underwriters' agent, should be charged to these respondents.

Seventh.—That amounts claimed by Lawrence Johnson & Co., as a compensation for their services and expenses, and commissions for selling cargo, disbursements, etc., and amounts paid Annan & Co., for inspecting the cargo under directions of Lawrence Johnson & Co., even if correct in amounts, are not chargeable to the respondents.

Eighth.—That certain surveys on the vessel amounting to $20 are not chargeable to respondents.

Ninth.—That the attorneys' fees and expenses, the expenses of furnishing bond, interest on $12,000 deposited, and commissions on disbursements are not chargeable to respondents.

Tenth.—That the respondents are not liable for interest on the amounts found to be due by them.

All of these points were argued with great ability, and earnestness by Mr. Parkin, of counsel for the respondents.

The items objected to are all included in the libellants' statements of claim; and it will be necessary to consider them separately.

I.

Was it proper to break up the voyage, and sell the cargo in Boston?

Under the circumstances of this particular case, the Commissioner thinks it was.

It is true that while the earlier surveys on the cargo recommended that it be sold for the benefit of all concerned, the later surveys not only do not make this recommendation, but assert that the condition of the cargo had been greatly improved by the judicious treatment which it had received; and the last survey of all, held just about the time the voyage was broken up (Feb. 28, 1891), seems to consider the possibility of a reshipment of a portion of the cargo to Lisbon, using the words, before quoted "should a shipment to Lisbon be contemplated, would advise" that the cargo be kept in separate bins, &c.

Even this survey, however, does not *recommend* the reshipment to Lisbon, of even a part of the cargo; and it is manifest from it, as well as from the other surveys and the testimony, that a great part of the wheat had been damaged beyond remedy, and that none of it was in perfect condition.

Moreover, there seems to have been no objection or protest on the part of the respondents, or any other parties in interest; and while their agreement of Feb. 20, 1891, (hereinbefore recited), that the vessel may receive her freight, does not expressly assent to the breaking up of the voyage; it evidently contemplates such a course as at least probable.

The respondents certainly must have known that it was intended to break up the voyage. Perhaps they were not legally bound to commit themselves, or to express any opinion on the subject, at the time; but their not doing so, is a circumstance proper to be taken into consideration in

determining the propriety of the action of the cargo owners, when such action so seriously affects the underwriters.

The special reason for the course adopted is found in the testimony of R. Winder Johnson (Libellant's original testimony pp. 40, 41, 47, and testimony before the Commissioner pp. 37, 49, 128.)

It seems from this evidence that the condition of affairs in Portugal is peculiar. There is a very high duty on wheat imported into that country, which *apparently* applies as well to damaged as to sound wheat. Damaged grain is unsaleable there, and in many cases the authorities have not permitted it to be landed. It is difficult, perhaps, to establish a market price in Portugal, because but little wheat is sold there in the open market, most of it being imported by millers to be ground into flour, (Testimony, page 128,). And millers are only allowed to import and grind a certain fixed quantity of foreign wheat (Testimony p. 129). Other ports of Europe, such as Liverpool and Antwerp, to which some of this grain was subsequently shipped by its purchasers,are not subject to the same objections. In them it seems that damaged grain may be disposed of, and possesses a market value (Libts.' original testimony, page 44).

No authority directly in point, or even materially useful in deciding this question, has been found; but taking into consideration the whole of the circumstances and the testimony, together with the general principles of law applicable to it, the Commissioner is of opinion, and so reports, that while the breaking up of the voyage and the sale of the wheat in Boston were for the benefit of the owners, they were not for their advantage alone, but for that of all interests, including those of the underwriters; that the adventure was practically frustrated, and, therefore, justifiably abandoned; and that these proceedings may fairly be said to have taken place "from necessity" as that term is used in the cases relating to the subject. Under the

evidence, it can hardly be doubted that if the cargo had been reshipped to Lisbon, the loss would have been very considerably greater than it has proved ; and, notwithstanding the very astute argument of counsel for the respondents on this point, the Commissioner is unable to see why the insurers would not have been worse off in case of such greater loss than they are now.

Let us suppose that the wheat had been reshipped to Lisbon. What would have happened ? None of it was in first-rate condition. About half of it was more or less seriously damaged—a great part of it very seriously—and some was practically worthless. From the nature of the case, no accurate testimony could be given as to what the seriously damaged portion would have sold for in Lisbon ; but if the evidence adduced be believed, it would have brought little or nothing. The other half might and probably would have sold to better advantage. It can hardly be claimed, however, that it would have sold as well in Lisbon as in Boston, having regard to the peculiarities of the Lisbon trade.

Now, it may be that so little foreign wheat is sold in open market in Lisbon that it would be difficult to establish a market price (as that term is usually applied), but surely there is *some* method by which the loss sustained by the shipper can be estimated where grain arrives at such a port sea-damaged. The law is quite clear that where there is no open market price, other methods shall be applied to determine the loss : and no authorities need be cited for such a proposition.

It seems to the Commissioner, therefore, that if it is shown by a preponderance of testimony that the probabilities were that, if the grain had gone forward, it would have sold (either in open market or by other fair test) for a considerably less sum than was actually realized for it in Boston, the propriety of its sale in Boston is established.

Suppose, then, that it had been reshipped, and, having arrived in Lisbon, had been sold at a considerable loss, would the underwriters have been liable for the loss? Clearly they would have been liable. According to the supposed case, the grain was damaged by a cause within the policies, and the underwriters would have been obliged to pay the difference between the price for which the damaged grain sold and the value of sound grain in Lisbon (whether such price and value respectively are technically "market price" or not), proportioned to the valuation in the policy.

Perhaps the evidence on the question might have been made more definite and satisfactory, but it is uncontradicted; and the inference from it is that this amount would have been a greater sum than the underwriters are now called on to pay; and, if this is so, the underwriters were benefitted by the sale in Boston, and must pay the loss upon the principle that such sale was "of necessity."

II.

As to the proper method of estimating the loss on the cargo.

The libel claims the loss sustained in the alternative; the fifth and sixth articles alleging a partial, and the seventh a total loss of the cargo. Before the Commissioner, however, the demand is for a partial loss; though the evidence shows that, but for the intelligent and efficient management of the representatives of the ship and the cargo, the loss might well have proved at least technically total.

The insured, therefore, had no technical right of abandonment, and his offer to abandon, which was not accepted by the underwriters, does not affect the question, except to emphasize the duty thrown upon him to care for the cargo.

Speaking accurately, the greater part of the loss claimed is rather a particular average than a partial loss; the former term being used to signify a loss on goods arising

from deterioration in value, and the latter a total loss of part of the thing insured.

Dixon's Law of Shipping, sec. 603.
Stev. & Ben. on Average, 281.

A distinction is also drawn by some writers between a particular average and a salvage loss.

McArthur on Marine Ins., 241.

In practice, however, and in the general discussion of the subject by courts and text writers, these distinctions have not generally been carefully made; and although where a partial loss and a particular average both occur on the same interest, the correct practice may be to adjust them separately (Dixon's Law of Shipping, sec. 607), McArthur (Mar. Ins., 934) says that the result is the same whether they be adjusted separately or together.

In presenting statements of their claims, however, the libellants have computed their loss on the whole cargo insured, by the method of deducting the aggregate price obtained from the sale of the damaged grain (that is, the whole cargo), from the valuation in the policies. In other words, they claim to recover upon the same principles of calculation as if there had been a total loss: the underwriter paying for the goods the amount at which they were valued in the policies, less the salvage, or amount realized for them.

The respondents contend that, as the loss is, admittedly, but partial; and as the cargo was accepted by its owners before the completion of the voyage, as originally contemplated, that is to say, at Boston instead of Lisbon, the loss on the wheat should be calculated upon the principles applicable to a partial loss or particular average at the port of destination; and that, under such circumstances, the port of refuge becomes the port of destination; made so by the action of the assured himself.

If this statement be adopted as the true one, the underwriters would be liable for their proportion of the loss, calculated by reference not only to the valuation of the goods in the policies, but also to the price obtained for the damaged goods, as compared with the market price of sound goods at that place, to wit, Boston.

In support of their contention on this point, the respondents have proved the market price of sound grain in Boston at or about the dates when the respective lots of this cargo were sold.

The method of calculation suggested is that proper to be adopted in case of partial loss, settled at the port of destination. This was decided in the leading case of *Lewis* v. *Rucker*, 2 Burr, 1167, as long ago as 1761. The rule is that the underwriter takes the proportion of the difference between sound and damaged at the port of delivery, and pays the proportion upon the value of the goods as specified in the policy. The prices are gross, without any deductions.

Johnson v. *Sheddon*, 2 East., 581.

There are other authorities to the same effect, and the various text writers on the subject follow these cases; though many of them state serious objections to the rule, and some of them intimate that it is not always applied in practice.

McArthur on Marine Ins., 248, 251.

Lowndes on Marine Ins., 176.

After much reflection on the question, the Commissioner is unable to adopt the method suggested by the respondents as applicable to the facts of this case.

If the voyage had been broken up and the cargo delivered to its owners for their sole benefit, the rule would have been applicable.

Shapley v. *Tappan*, 9 Mass., 20.

Nor will its application be prevented by the fact that it was for the pecuniary advantage of the assured to break up the voyage and sell the cargo at the port of refuge. If this were all, the percentage rule must be followed and the loss be adjusted on the principles which would have been applied at the port of destination.

Arnould on Marine Ins., 936.

Phillips on Ins., sec. 1467.

Although Mr. Phillips seems to intimate that it is at the option of the assured whether he will have the loss so adjusted or not, the authorities hardly support him; and, perhaps, he does not mean to state the conclusion so strongly.

The case presented, therefore, is one where the whole cargo has been sold by the assured—the cargo owner—in an intermediate port, for the benefit of all concerned, and to prevent greater loss; although it is possible that some part of it, at any rate, after it was reconditioned, might have been reshipped to its destination without further deterioration.

What are the principles to be applied to such a case?

Most of the cases and the text writers have considered the subject as applying to instances where a part only of the cargo is damaged, and where further deterioration in value is feared if it be shipped.

For example, Mr. Phillips (2 Insurance Sec. 1480), says "that where damaged goods, being a part only of the goods insured by the policy," are sold at an intermediate port, the loss is a salvage loss.

Mr. Stevens says, in his work on Average (p. 79), "that where the cargo being unloaded at a port of refuge, some of the goods are found damaged, and to prevent

further deterioration, are sold, the loss is adjusted on the same principles as a total loss."

Mr. Lowndes (Marine Ins., 2d Ed., sec. 161), says, "that where a portion of some one commodity insured is wholly lost or destroyed, or is necessarily sold before reaching its original destination, the insurer is to pay the value in the policy of that portion which is totally lost or sold short of its destination, taking credit, in the latter case, for the amount realized by the sale."

McArthur (Marine Insurance, 241), speaks of cases where only a part of the subject insured is sold short of its destination, as being those to which the rule of salvage computation applies.

And Mr. Parsons (2 Marine Ins. 411), says, "That if a ship at an intermediate port, finds a part of its cargo so injured by sea damage that it is unfit to be carried on, it may be sold at that port, and the loss be adjusted as a salvage loss."

Except, perhaps in recognition of the very technical distinctions between general and particular average and salvage losses on goods, there would seem to be no good reason to restrict the rule of partial loss to cases where but a part of the cargo was sold. The reason of the rule applies quite as strongly to cases where the whole cargo being partly damaged, is justifiably sold at the intermediate port.

This is recognized by Arnould (Marine Ins., 6th Ed., 936), who applies this rule to cases where, after the cargo has been unloaded at the port of refuge, it is discovered that *the whole*, or part of it, is so damaged that it would probably be wholly spoiled if reloaded and sent on, and to prevent further deterioration, it is sold on the spot for the benefit of all concerned.

In considering the first division of respondents' contention, it has already been determined that the voyage was properly broken up in Boston and the cargo sold, from a

necessity applying to the circumstances of this particular shipment and cargo.

In most cases, one of two conditions will exist: either there will have been a technical total loss, or a part of the cargo will have been in condition for reshipment to the original port of destination. The language of some of the text writers, declaring that the salvage rule applies to cases where further deterioration of the cargo is feared, must be considered as used with reference to such cases. The true rule is that the principle shall be held to apply to any case where the cargo, being partly damaged, is necessarily sold at the port of refuge.

Mr. Phillips (2 Ins., sec. 1480), says that the underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port, is obviously expedient, and made on account of damage by the perils insured against: where if the subject were forwarded to the port of destination, it would be greatly diminished in value, or be of no value, on arriving there.

Or, as Mr. Stephens states it (Average, page 86) when the goods are sold from the necessity of the case.

And Mr. McArthur (Marine Ins., 241, note i), says that there should be proof that the liability of the underwriters would have been at least as great if the goods had been forwarded, and the loss stated in accordance with the rule applicable in case of goods arriving sea-damaged at their destination.

See also

Rosetto v. *Gurney*, 11 C. B., 176.

As before stated, it is not *certain* that, in the present case, the whole cargo would have seriously deteriorated or have been wholly spoiled, in a physical sense, if reshipped to Lisbon, because it had been greatly improved by the reconditioning process, and, possibly, might have arrived without further serious deterioration. But it was "wholly

spoiled " under the circumstances of this case ; in that practically, it would have been almost valueless at Lisbon.

Taking the definitions of the cases and of the text writers together, a fair statement of the law applicable to this case would seem to be, that the whole cargo, having been necessarily sold in Boston, for the benefit of all concerned, the underwriters are liable for the difference between the sums realized at the sale and the valuation in the policies.

III.

That credit should be given for the $1534.17, the reduction from gross claim of Peter Wright & Sons, paid by the agents of the cargo.

The Commissioner thinks that this deduction should be made. To hold otherwise would be to allow libellants to recover money to which they are not entitled.

The case should be treated as if Wright & Sons' claim had originally been for $15,579.37, instead of $17,113.54. The deduction was made in gross, and not from any particular bills rendered ; and although it was chiefly referable to the charges made by Peter Wright & Sons for their services (Testimony, p. 89), it will be necessary to deduct it proportionally, from each of the bills paid by Peter Wright & Sons, as adjusters' statement and in this report ; and according to the apportionment of each bill as made by the adjusters.

IV.

That the services of a watchman on the lighters was unnecessary.

The evidence does not support this contention. The watchman was employed for night duty only, and his presence seems to have been necessary. (Testimony, page 83.)

V.

As to premiums paid for insurance of the cargo while on lighters and in the elevator in Boston.

The cargo was insured in Boston under two classes of policies—*first*, marine policies, applying to the grain in lighters after it had been unloaded from the vessel, and, *second*, policies insuring against loss by fire while the grain was in the elevator.

The first class were taken by the master of the vessel, on account of whom it may concern; the "insurance to take precedence over any marine insurance that may have been placed on said grain per steamer *Liscard* from New York to Lisbon." The policies, though similar, are not identical in their terms, some insuring the cargo "free from particular average," and others "free from particular loss, unless caused by stranding, sinking, burning, or collision with another vessel."

The premiums paid on these policies amounted to $276.25.

The second class of policies were taken by the master, "for account of whom it may concern, loss, if any, payable to Peter Wright & Sons, agents of the vessel."

The premiums upon these policies amounted to $505.26.

Under both classes of policies the insurance seems to have been taken for the full estimated value of the grain.

In the adjusters' apportionment, all of the premiums were apportioned as special charges on cargo.

The libellants claim that the master was justified in making these insurances, as a matter of prudent precaution, for the benefit of all concerned, as well as to protect himself against loss, in general average, if the grain should be destroyed; and they adduce testimony to show a custom that such insurance be effected, under circumstances similar to those of this case.

The respondents reply that the cargo was fully protected from loss under the original policies, which covered it while in Boston as well as on the voyage proper, and that respondents are not bound to reimburse the master or the libellants for an unnecessary expenditure.

There would seem to be no doubt that the original policies covered the cargo not only in the ship, but also in the lighters and the elevator.

Lowndes, Marine Insurance, 63,

McArthur, Marine Insurance, 119,

Considerable testimony was taken on the question as to whether or not a custom exists that such insurance should be effected and the premiums come into contribution.

The Commissioner does not think that any legal and binding custom is established. The general average statement, prepared by Johnson & Higgins, allows the charge; and all the witnesses called by libellants to support the charge as a customary one are connected with that firm. Undoubtedly they must have approved it, or they would not have allowed it in the statement. When carefully examined, however, the testimony of these witnesses is hardly sufficient to establish a binding custom. It does appear from their evidence that where such insurance has been effected average adjusters (so far as these witnesses know) generally include the premiums in the statement, and they are not questioned; but Mr. Rush admits that while such insurance is generally effected, it is not done in every single instance (page 163), nor is the allowance made in every case (page 165). Its propriety has been occasionally discussed by the average adjusters (page 167).

Mr. Hadley, who is in the employ of one of the respondent companies, but is a person of experience whose evidence is entitled to consideration, testifies that while such insurance is sometimes effected, it is generally done with the authorization of the original insurers; that where this

is not the case, there is no general custom either to include it in the statement, or, if included, to pay it; that the matter has been discussed in Committee of the National Board of Underwriters in New York in other cases, and a conclusion reached adverse to the allowance. (Testimony pp. 140, 143). While it cannot be claimed that the decision of this Board is conclusive, or perhaps, even competent as evidence against the claims, as such, the testimony certainly does show that there is no such agreement on the subject as is requisite to support a custom.

Whatever may have been the practice in earlier times, in the absence of full proof of a well defined custom, courts no longer accept the opinion of business men as conclusive upon questions of law.

Carver on Shipping, sec. 193.

If the insurance at the port of refuge is effected in relief and for the benefit of the original underwriters, as one of the libellant's witnesses seems to think (page 176), it does not seem unreasonable that they should be consulted as to whether or not they desire the cargo to be so insured. There might be various reasons which would influence them in preferring either to allow the matter to stand, or to make their own reinsurance, if they should so wish.

The ship master, or any others in interest, could probably have insured the cargo in an amount sufficient to cover their own expenses, charges or disbursements, and perhaps there might be circumstances in which it would be justifiable for a ship master to insure the cargo for the benefit of its owners. Even then, there might be a doubt whether the original underwriters, if any, could be held liable to contribute to the premiums. The present, however, is not such a case. The cargo was not only already insured in reputable companies, but was known by all parties in interest to be so.

Nor does the contention of the libellants that the expense was justifiable because the respondents herein disputed their liability, seem to the Commissioner to be sound. It does not appear that they have ever disputed their liability to contribute to all lawful general average charges: and even if there had been an entire denial of all liability, the *fact* of liability remained. If the master or the cargo owner doubts the validity of the original insurance, and chooses to take additional insurance he may do so, but he must pay the premium.

The Commissioner, therefore, decides that, as these policies were taken for benefit of all in interest, and for the full value of the cargo, the respondents are not bound to contribute to the payment of the premiums, either in general average or as special charges, up to the time of the breaking up of the voyage.

There was some insurance after that time, both in Boston and on the voyage to New York; but the Commissioner does not understand that any question is raised as to this. Even if the cargo owner be not considered as technically an agent to effect such insurance, in this case it was obviously for the benefit of all concerned that it be taken.

VI.

As to the sum of $700 paid Mr. Coe for services and expenses as underwriters' agent.

The testimony shows that Messrs. Johnson & Higgins, (through whom, as insurance agents, the whole of the cargo had been insured,) sent Mr. Coe, one of their employees, to Boston, in the interest of all the underwriters. Just what service Mr. Coe performed, is not shown very satisfactorily, but assuming that it was valuable service to those whom he represented, it is not clear that respondents are bound to contribute to it. Johnson & Higgins represented neither the

vessel nor the cargo; nor were they in anywise bound to protect, or "sue and labor" for the protection of either The respondents positively declined to join in the employment of Mr. Coe, and it appears that they had an agent of their own in Boston, who was expected to look after their interests.

The Commissioner does not think that respondents are bound to pay for Mr. Coe's services; and he so reports. The sum was apportioned by the adjusters $233.33 to special charges on cargo, and $466.67 in general average.

VII.

As to the charges and expenses of Lawrence Johnson & Co., and Annan & Co.

The Commissioner understands. that the first item objected to forms a part of the $1750.04 mentioned in libellants' claim as hereinbefore stated, and that, it consists of General services of Lawrence Johnson & Co., to the cargo, $1,500.

These charges, (and indeed all of the charges included in the $1,750.04), were referred by the average adjusters to the account of the cargo and owners, and were not admitted either in general average or as special charges on cargo.

Mr. R. Winder Johnson, a member of the firm of Lawrence Johnson & Co., was examined at length on these claims.

The services seem to have consisted chiefly of a constant supervision of all that was done by the master of the essel and Peter Wright & Sons, her agents, up to the time

of the breaking up of the voyage and the delivery of the cargo. All of the important contracts were examined and approved, the lighters and elevators were visited and their work supervised. Constant correspondence with all parties in interest was conducted, as to the condition of the cargo and its disposition, together with negotiations as to its surrender by the ship. The bills of lading were obtained and surrendered and the freight paid. A bond in $15,000 was procured and entered, and $12,000 deposited to cover the vessel's charges, etc. After the surrender of the cargo, it was taken charge of and its sale arranged for and made. After the sales, negotiations were begun and finally completed with Peter Wright & Sons, in consequence of which the reduction of $1,534.17 on their bills was obtained.

Libellants claim that these services were rendered under the "sue and labor" clause in the policies; that they were necessary; and that the amounts charged are reasonable, and have been paid by them.

Respondents object to the charges; contending that whatever services were rendered by Lawrence Johnson & Co., prior to the breaking up of the voyage, were unnecessary, as Peter Wright & Sons were attending to all of that branch of the business, and were liberally paid for doing so; that whatever services Lawrence Johnson & Co., rendered after the reconditioning and delivery of the cargo, they performed for the benefit of the cargo owners alone, and that even if this were not so, they are fully compensated by the commissions which they have charged for services and disbursements.

It is also urged that the shipmaster and his agents were the proper persons to do the work under the "sue and labor" clauses; and therefore, that the labors of Messrs. Johnson and Annan, were supererogatory, and should not be paid for by the underwriters.

The Commissioner is greatly embarrassed in deciding as to the claims included under this heading.

On the one hand, it is to be remembered that these underwriters from the first, stood upon their rights, and refused to have anything to do with the cargo (Testimony pp. 7, 8). This course rendered it prudent for the cargo-owners to exercise great care. Under the provisions of the policies *the owners of the cargo* were to "sue and labor" to rescue and preserve the cargo. This they might do through their agents: nor in the selection of such agents were they confined to the shipmaster and his appointees. They were entitled to the services of representatives selected by themselves.

In fact, the primary liability under this clause is placed upon the insured, or the agents selected by them.

Lowndes on Marine Ins. Secs. 198, 199.

It is only from necessity, and in a secondary sense, that the shipmaster and his appointees can be considered such agents.

Unless, therefore, the claims are for unnecessary services, or are too great in amount, they must be allowed.

Mr. Johnson testified that the services of his firm were fully worth the sums charged (Testimony pp. 31, 75, 86), and evidently considers that they were necessary. His good faith in so testifying is not doubted (certainly not by the Commissioner), and no witness has been called to contradict him.

It is impossible, however, to shut our eyes to the fact that the charges in this case have been very large; it may fairly be said, unusually so. Without counting the bills paid for repairs, lighterage, storage, elevator, telegrams, inspectors, surveys, brokerage, average adjusters and other like expenses obviously necessary (and assuming that the whole of the $1,534.77 deducted from bills rendered by Peter Wright & Sons, should be taken from the amount claimed by them as compensation for their services), the

claims for services and expenses of agents for vessel, cargo and underwriters and their counsel, aggregate between $11,000 and $12,000.

Prior to the breaking up of the voyage Messrs. Peter Wright & Sons had two employees in Boston at an aggregate expense of about $850. Mr. Foering, the inspector employed by them as an expert to inspect and give personal supervision and superintendence to the handling, reconditioning and storage of the grain, received nearly $1,200. In addition to these sums charged for the services and expenses of persons on the ground and superintending the details of the work, Peter Wright & Sons received for their services (deducting the $1,534.77, and not counting commissions to a considerable amount charged in addition) the sum of $2,165.23.

As before stated, the original claim of Peter Wright & Sons for services was $3,700, which the average adjusters have apportioned as follows: Special charges on cargo, $750; general average, $2,200; vessel and owners, $750. It does not appear upon what basis this apportionment was made, but it may be assumed that the adjusters had some information on the subject which induced them to so adjust the amount.

Lawrence Johnson & Co. have received commissions for sale of the cargo, entering bond, etc., amounting to $2,479.58.

The Commissioner is not called upon by either party to criticise the payments made Peter Wright & Sons, and therefore he expresses no opinion with regard to them. But where, under such circumstances as these, the total bills (not for manual and expert labor, but for general superintendence and agency alone) from the ship's arrival in Boston to the breaking up of the voyage, a period of a little more than two months, amount (exclusive of commissions) to $4,215.23, as above, it would seem very doubtful whether a prudent cargo owner would have incurred any

additional expense for the like services, or if he did, whether his underwriters ought to be bound to contribute to it, especially in view of the fact that the vessel's agents were well known, reputable and competent people. Even if the cargo owner had a right to select his own agent, he could hardly accept the agency of the vessel's representatives, pay for their services, and at the same time employ agents of his own to do practically the same work.

After the voyage was broken up, however, the situation was changed, and Lawrence Johnson & Co., as representing the owners, were entitled to receive such compensation as their services, rendered to all interested, were worth: and the cargo owners, having paid it, may recover from their underwriters. The cargo owners were also entitled to some compensation for their labor in breaking up the voyage. They are not entitled to be paid by the underwriters for labor expended in reducing Peter Wright & Sons' claim. It was their duty to see that the amounts paid were correct. Nor are they entitled to be paid for negotiations or correspondence with the underwriters with regard to the settlement or payment of the claims, or for attention to these suits. All of these things are incident to their situation: and while Lawrence Johnson & Co., having acted for absent owners, might have been entitled to be paid by *them* for such work, it by no means follows that the underwriters are to be called on to contribute to the expenditure.

There were sold 86,102 15/60 bushels of wheat. The ordinary commission for attending to the sale of sound wheat, is one cent—frequently reduced to one-half cent—a bushel. Allowing one cent, it would seem that the commission to be paid Lawrence Johnson & Co. for attending to the sale of this quantity of sound wheat would be $861.02.

A great deal of testimony was taken, however, upon the question of the proper commission to be charged for

the sale of the damaged cargoes, disposed of at a port of refuge. There have been very few such sales of cargoes of damaged grain. Evidence was adduced on behalf of the respondents, tending to show that one per cent. would be sufficient compensation for such sales.

The fair preponderance of the testimony, however, establishes that, in addition to the charges of brokers or auctioneers, it is not unusual for the merchant, or other person having custody of the cargo, to receive a commission of two and a half per cent. upon the amount realized at the sale, and that, while such a percentage may be a large, it is not an exorbitant commission. Perhaps it is not to be expected that a merchant should take charge of a whole ship's cargo of sea-damaged wheat at the same rate as would be asked for the disposal of one or two car loads of inferior grain arriving by rail.

The commissions charged by Lawrence Johnson & Co., and deducted by them from the gross product of the sales of the cargo, are two and a half per cent. upon the amounts realized at the sales of the various portions of the cargo; and they amount in the aggregate to $1,898.06. This amount was properly deducted, and is allowed.

It is evident from the testimony that the reason for allowing a commission for the sale of damaged cargo larger than that proper in the case of sound cargo, is that damaged cargo requires extraordinary care and attention while on hand, and is presumably more difficult to sell. Therefore, where the full commission is charged and allowed, it must be understood as covering whatever labor and responsibility have been undergone by the custodian of the cargo, greater than he would have been subjected to had the grain been sound.

Bearing this in mind, it is impossible to allow in addition to the commissions, the full amount of $1,500 claimed

for the services of Lawrence Johnson & Co. The greater part of the services rendered, as detailed by Mr. Johnson, must be included either under the head of those for which Peter Wright & Sons were paid (and which can not be paid for over again) or those for which Lawrence Johnson & Co., themselves were compensated by their commissions.

As already said, however, the cargo owners are entitled to be reimbursed such expenses as were properly incurred in the breaking up of the voyage for the benefit of all concerned. They were justified too in sending to Boston a representative who could make such inquiries as to enable him to assure them that the shipmaster or his agents had not abandoned the cargo, but were taking measures for the protection of its interests.

Lawrence Johnson & Co. attended to these matters on behalf of the cargo owners : and while it is very difficult to estimate exactly how much their services in this respect were worth, a careful review of the testimony convinces the Commissioner that $500 is a proper and liberal compensation, and that sum is allowed. The remainder of the claim ($1,000) is disallowed.

The sum of $70.91 claimed as paid Lawrence Johnson & Co. for their expenses in visiting Boston is allowed in addition.

Some of the observations already made apply also to the claim for compensation to Annan & Co. This firm were grain inspectors, employed and paid by Lawrence Johnson & Co. for the cargo owners.

There were three bills, for $290.34, $25.27 and $50 respectively. The first was for services rendered and expenses incurred before the breaking up of the voyage.

The whole of this claim was objected to by the respondents ; but except that the average adjustment shows its apportionment to special charges on cargo, and that Mr. Johnson testifies, in a very general way, that he considers

the expenditures to have been necessary, no evidence was offered to support it. So far as it appears, Mr. Foering, who had been employed by Peter Wright & Sons, was doing practically the same work as that for which Annan & Co. were employed, and was paid $1,200 for doing it. It may have afforded the cargo owners some satisfaction to have an inspector of their own on the ground; and if so, they have a right to employ and pay him; but, in the opinion of the Commissioner, they cannot charge his services to the underwriters. The bill for $290.34 is, therefore, disallowed.

The other bills, amounting to $26.27, were for services rendered after the voyage was broken up, (Testimony, pp. 56, 57) and are allowed.

VIII.

As to certain surveys on the vessel.

These surveys are two in number, and their cost aggregates $20. Both were made after the breaking up of the voyage, and apparently with a view of obtaining evidence on behalf of the libellants in these causes. They seem obviously for the benefit of the cargo owner alone, and were so considered by the adjusters, who have debited them to vessel and owners. They can not be considered as coming under the "sue and labor" clause of the policies, and are disallowed.

IX.

As to attorneys' fees and expenses, expenses of furnishing bond, interest on the $12,000 deposit, and commissions on disbursements.

No contention seems to be made as to the amounts of these items, but only as to the liability of the respondents to contribute to them.

They were all incident to the breaking up of the voyage in Boston ; and if that is justifiable and for the benefit of all concerned, it would seem that all such expenses as were necessarily or naturally incurred in and about the matter, should be allowed.

Without, therefore, going into further detail or argument, the Commissioner reports that the respondents are liable for their proportion of these charges as set forth and apportioned in the adjustment and statement, and included in the calculations hereinafter made.

No commissions, however, will be allowed for percentages on payments which have been disapproved of in this report.

X.

As to interest.

The libellants have handed to the Commissioner their statement of claim of interest, as follows :

1. On the sum of $12,000 the amount deposited in bank by them (through Lawrence Johnson & Co.) to secure special charges of ship against cargo, from March 2, 1891, the date of the deposit.

2. On $3,579.37 being the balance of the $15,579.37 paid Peter Wright & Sons, from date of payment, October 29, 1892.

3. On $3,600 freight, from date of payment, March 2, 1891.

4. On bills paid through Lawrence Johnson & Co., from an average day, say March 15, 1891.

5. On the amount of proportion due for partial loss, from the date of the loss.

The respondents claim that as the policies provide for payment thirty days after proof of loss, and no proper proofs

of loss nor any correct adjustment have ever been submitted, they are not liable for any interest whatever.

Some cases have been cited by the respondents, and others might have been referred to, in which awards of interest have been refused in suits upon insurance policies. In all of these cases, however, there was serious default, of some kind, on the part of the assured. It is believed that no case can be found deciding that, under circumstances similar to those of the present case, where the underwriters have, from the beginning, vigorously contested their liability for the greater part, if not the whole, of the amount now found to be due by them, the libellants have been deprived of all interest on the amounts so found due, because they may have committed some errors in the presentation of their claims. If this were the law, the slightest variation from established usage, or the least error in mathematical calculation in a statement of average and special charges, etc., would enable the underwriter to retain and use the money of the assured until the conclusion of a suit on the policy. This would be inequitable.

The assured originally attempted to abandon the cargo to the underwriters, and claim a total loss; and this claim, as has been hereinbefore stated, is found also in the libel; but upon the declination of the underwriters to accept the abandonment, he, through his agents, took charge of the cargo himself, and saved it from destruction. There was not a technical total loss, but the underwriters have not been seriously misled by the claim, nor do they seem to have been put to any additional expense by reason of it; especially as the loss is to be adjusted on the same general principles as if it had been total.

The policies provide that "in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said merchandise."

On the 29th of April, 1891, proofs of loss were furnished the underwriters. These, however, were not complete, as the adjustment had not yet been finished. The adjustment was made up May 29, 1891, and soon after (it does not appear exactly at what date) a copy thereof was served upon the underwriters. Negotiations were had as to the settlement, and on November 14, 1891, Lawrence Johnson & Co., as representing the cargo owners, wrote the underwriters, calling their attention to these facts, and enclosing "a corrected statement based upon the adjustment." (Respondents' printed testimony, etc., p. 19.) This statement is identical with the claim made by the libellants herein, except that it does not ask any interest other than that included in its figures as taken from the adjustment and statement.

It would appear, therefore, that on November 14, 1891, the libellants claimed from the respondents the same principal sums that they now claim.

It does not appear that the underwriters specified their objections to the proofs, or the statement of claims, so that they might be corrected if they were erroneous. They simply declined to pay—admitting, perhaps, their liability to contribute in general average, but not specifying the amount of such liability. Unless, therefore, it should be held that the libellants ought to forfeit interest because of the errors in their claim heretofore referred to in this report, they will be entitled to recover it. They seem to have been willing to receive the principal amount of their claims as rendered November 14, 1891. This is all they then asked: and until that date there is nothing in the evidence to show that the underwriters had been furnished with such a complete statement of libellants' claim as is necessary to constitute proper proofs of loss. It would, therefore, be right to treat the letter of Lawrence Johnson & Co., and the statement of claims enclosed in it, as the completion of the proofs of loss, and to allow thirty days from the date of these papers, in accordance with the terms of the policies.

The Commissioner adopts this view, and reports that decrees should be entered against the respondents respectively for the principal sums due as indicated in the average adjustment and statement of special charges (as modified by this report) as of December 15, 1891, with interest thereon from that date, at the rate of six per cent. per annum.

Contributory Value of Freight.

The bills of lading provide that the adjustment of average shall be according to the York-Antwerp Rules. This forms the contract, and the adjustment should be so made.

It appears, however, by the adjustment (page 179) that although the wages and provisions are estimated from the date of arrival in the port of refuge, as provided by these rules, the contributory value of the freight is estimated according to the Massachusetts rule, one-third being deducted. (Adjustment, p. 205; Testimony, p. 104.)

According to the York-Antwerp Rules, there should have been deducted from the gross freight ($3,600) "such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average." (York-Antwerp Rule, 17; cited McArthur Ins., p. 401), or as cited by Mr. Rush (Testimony, p. 104), "deducting the expenses that would have been saved had the vessel, at the time of the sacrifice, been a total loss."

It would seem, therefore (and it is so reported), that there should be deducted from the gross freight the sum of $79.91, being proportion of wages for three days, *i. e.*, from the time of bearing away until the arrival in port; leaving the contributory value of the freight $3520.29, instead of $2400, and making the amount which the freight should contribute $246.31, instead of $184.13, as stated in the adjustment.

An elaborate calculation having been made upon the basis of the original average adjustment, as modified by this Report (which calculation, it is agreed by the parties, may be omitted from this Report, the results only being stated), the amounts due by the respective respondents are found to be as follows:

By The London Assurance.	
General average and special charges	$3,537 84
Salvage loss	6,032 65
	$9,570 49
By The Manheim Insurance Company.	
General average and special charges	$1,768 92
Salvage loss	3,254 28
	$5,023 20

The Commissioner, Therefore, reports that decrees should be entered against the London Assurance in the sum of Nine thousand five hundred and seventy Dollars and Forty-nine Cents; and against The Manheim Insurance Company, in the sum of Five thousand and twenty-three Dollars and Twenty Cents, with interest on the sum awarded in each case, from December 15, 1891, to the date of final decree.

All which is respectfully reported.

EDWARD F. PUGH,

May 22, 1894. *Commissioner.*

The Commissioner further reports that, having given due notice, according to the rules of Court, to the proctors for the respective parties, of the time of filing his Report, the exceptions hereto annexed were presented.

He finds nothing in the exceptions which requires extended comment. They raise nearly all of the questions of law and fact which the Commissioner has determined, to the best of his ability, after much labor and reflection. If there is error, it must be corrected by the Court.

The allowance of interest is a matter solely in the discretion of the Court, but the Commissioner thinks that his recommendations on that subject meet the equities of the case.

EDWARD F. PUGH,

June 1, 1894. *Commissioner.*

The Exceptions of Companhia de Moagens do Barreiro, Libellants, to the Report of Edward F. Pugh, Esq., Commissioner, to whom it was referred to Assess the Damages sustained by the Libellants in the above-entitled Causes.

I. Libellants except to the said Report because a general credit against all charges was given respondents for the sum of Fifteen hundred and thirty-four Dollars and Seventeen Cents ($1,534.17), the amount of the abatement secured by libellants from the gross bill of charges and disbursements of Peter Wright & Sons, when most of said charges are not contested by respondents, and should not be reduced at all, and because said deduction was not credited against the items and parts of items improperly charged in said bill, the said improper or excessive charges of said bill being the very consideration which enabled the libellants to secure the said deduction from the total bill of Peter Wright & Sons.

II. The libellants except to the said Report because the Commissioner has disallowed the premiums paid for insuring the cargo while on the lighters and in the elevators in Boston, after the cargo had been discharged from the *Liscard*,

though the said insurance had been made in good faith and the premiums had been paid by Peter Wright & Sons, and allowed by the average adjusters, and was a reasonable and proper expense to protect the cargo.

III. The libellants except to the said Report because no allowance was made for premiums for insurance to the amount of the general average charges against the cargo on the lighters and in the elevators, though the insurance companies, the present respondents, which had underwritten the cargo, denied their liability at that time, and though premiums for insurance were actually received by The London Assurance Company, one of the respondents.

IV. The libellants except to the said Report because the Commissioner erred in disallowing the sum of Seven hundred Dollars paid for the services of Mr. Coe, as underwriter's agent, though these services were reasonable and proper, and had been allowed by the average adjusters, and though all of the underwriters on the cargo of the *Liscard* had authorized the performance of such services, including these respondents, and though these respondents did not withdraw their agreement upon their part until after Mr. Coe had been sent from Philadelphia to Boston, and had commenced the performance of such services.

V. The libellants except to the said Report because the Commissioner reduced the compensation claimed by Lawrence, Johnson & Co. for their services, expenses, and commissions for selling the cargo, inspecting it, and attending to the business of its re-conditioning for the benefit of all the parties in interest, though such services were allowed by the average adjusters and inured to the benefit of the respondents, and the charges therefore were reasonable and proper, and necessary to protect the cargo interests against the interests of the ship.

VI. The libellants except to the said Report because interest was denied the libellants upon their loss, from the time such loss was legally payable, under the terms of the policy of insurance, until November 14, 1891, though the said respondents had contested their liability from the very time of the loss, and had the use of the money due the libellants from the time the same should have been paid by the respondents. And because the Commissioner erred in holding that proofs of loss and interest, as provided by the policy, requires a precise statement of the exact amount of libellant's claim, when the legal meaning of the said provision requires only that the assured shall present to the underwriters proof of his interest in the property, and that a loss or damage of the same has occurred.

VII. The libellants except to the said Report because the Commissioner erred in holding as to all the disallowed items and parts of items that the services charged for must be necessary, instead of holding that services must be reasonable.

JOHN F. LEWIS,
CURTIS TILTON,

May 28, 1894. *For Libellants.*

The London Assurance Corporation and The Manheim Insurance Company, the respondents in the above entitled causes, respectively make and file the following exceptions to the Report of Edward F. Pugh, Esq., the Commissioner appointed by the interlocutory decree to assess the damages sustained by the libellants in the above entitled cases.

I. The respondents except to the finding contained in paragraph I of said Report, to the effect that it was proper to break up the voyage of the *Liscard* at Boston.

II. The respondents except to so much of said para-

graph as finds that the breaking up of the voyage and sale of the wheat in Boston were not for the advantage of the owners alone, but for that of all interests, including those of the underwriters, and to so much thereof as finds that the adventure was practically frustrated and, therefore, justifiably abandoned. And to so much thereof as finds that these proceedings may fairly be said to have taken place from necessity.

III. The respondents except to so much of said paragraph as finds that if the cargo had been reshipped to Lisbon the loss would have been considerably greater than it has proved, and to so much as finds that the insurers would have been worse off in such case than now.

IV. The respondents except to so much of said paragraph as finds that the seriously damaged portion of the wheat would have brought little or nothing in Lisbon, and to so much as finds that the other half of the wheat would not have sold as well in Lisbon as in Boston.

V. The respondents except to so much of said paragraph as reports that if the grain had been shipped to Lisbon the underwriters would have been obliged to pay the difference between the price for which the damaged grain sold and the value of sound grain in Lisbon, proportioned to the valuation in the policy.

VI. The respondents except to so much of said paragraph as finds that the inference from the testimony is that the amount for which the underwriters would have been liable, if the grain had been shipped to Lisbon, would have been a greater sum than they are now called upon to pay, and to so much as finds that the underwriters were benefitted by the sale in Boston.

VII. The respondents except to the refusal of the Commissioner, as stated in the second paragraph of his

Report, to treat Boston as a substituted port of destination, and adjust the loss on the principles applicable to a partial loss or particular average at the port of destination.

VIII. The respondents except to so much of the said second paragraph as finds that the case presented is one where the whole cargo has been sold by the assured in an intermediate port for the benefit of all concerned and to prevent greater loss.

IX. The respondents except to so much of the second paragraph as finds that the cargo was wholly spoiled under the circumstances of the case, and to so much thereof as finds that practically it would have been almost valueless at Lisbon.

X. The respondents except to so much of the second paragraph as finds that the underwriters are liable for the difference between the sums realized at the sale and the valuation in the policy.

XI. The respondents except to the finding in the fourth paragraph of the Report, that services of the watchman were necessary, and to the allowance in general average of the charges for his services.

XII. The respondents except to so much of the seventh paragraph as reports that after the voyage was broken up, Lawrence Johnson & Co. were entitled to receive compensation from the underwriters for their services, and to so much as reports that they were entitled to receive compensation for their labor in breaking up the voyage.

XIII. The respondents except to so much of the seventh paragraph as finds that it was not unusual for the merchant or person having custody of a damaged cargo to receive a commission of 2½ per cent. for effecting a sale of damaged cargo in a port of distress.

XIV. The respondents except to the allowance of a commission of 2½ per cent. to Lawrence Johnson & Co. upon the amounts realized at the sale of the wheat.

XV. The respondents except to the allowance of $500.00 as compensation to Lawrence Johnson & Co., as set forth in the seventh paragraph of the Report.

XVI. The respondents except to the allowance of $70.91 for the expenses of Lawrence Johnson & Co. in visiting Boston.

XVII. The respondents except to the allowance of the sums of $26.27 and $50.00, aggregating $76.27, for payments to Annan & Co.

XVIII. The respondents except to the allowance of the item of $500.00 for attorney's fees and expenses, and $110 for attorney's expenses, as allowed by the ninth paragraph of the Report.

XIX. The respondents except to the allowance of the item of $150.00 for expenses of furnishing a bond, as allowed by the ninth paragraph of the Report.

XX. The respondents except to the allowance of the item of $30 for interest on the $12,000 deposited to meet special charges, as allowed by the ninth paragraph of the Report.

XXI. The respondents except to the allowance of commissions on disbursements as allowed by the ninth paragraph of the Report.

XXII. The respondents except to the allowance of interest on the libellant's claim.

XXIII. The respondents except to the adjustment of the loss on the cargo as a salvage loss.

XXIV. The respondents except to the refusal of the Commissioner to adjust the loss as a particular average.

XXV. The respondents except to so much of the Report as finds the amount due from The London Assurance for loss on the cargo to be the sum of $6,032.65.

XXVI. The respondents except to so much of the Report as finds the amount due from The Manheim Insurance Company for loss on the cargo to be the sum of $3,254.28.

XXVII. The respondents except to so much of the Report as finds the amount of general average and special charges due from The London Assurance to be the sum of $3,537.84.

XXVIII. The respondents except to so much of the Report as finds the amount of general average and special charges due from The Manheim Insurance Company to be the sum of $1,768.92.

XXIX. The respondents except to so much of said Report as reports that a decree should be entered against The London Assurance Corporation in the sum of Nine thousand five hundred and seventy Dollars and Forty-nine Cents.

XXX. The respondents except to so much of said Report as reports that a decree should be entered against The Manheim Insurance Company in the sum of Five thousand and twenty-three Dollars and Twenty Cents.

XXXI. The respondents except to so much of said Report as reports that interest should be awarded on the above mentioned sums from December 15, 1891.

MORTON P. HENRY,
Proctor for Respondents.

IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN ADMIRALTY.

COMPANHIA de MOAGENS do BARREIRO, *vs.* THE LONDON ASSURANCE.	No. 8 of 1892.
SAME *vs.* THE MANHEIM INSURANCE COMPANY.	No. 9 of 1892.

Depositions taken and exhibits offered in evidence before Edward F. Pugh, Commissioner appointed by the Court to assess the damages sustained by the libellants, and make report, etc.

WEDNESDAY, November 25, 1893, 2.30 p. m.

Present.—THE COMMISSIONER; MR. TILTON, for libellants.
MR. HENRY, for respondents.

Mr. Tilton, for the libellants, states his claim as follows:

The libellants claim :

First.—For partial loss upon the wheat insured, arising from sea peril damage.

Second.—The charges in general average, and the special charges upon cargo incurred in relation to the cargo as set forth in the general average account.

Third.—To recover, under the "sue and labor" clause of the policy, for all expenses and charges incurred in the preservation of the damaged cargo; and generally all charges properly recoverable under that clause.

Mr. Tilton submits a statement, marked "Exhibit A, October 25, 1893," which he believes to be correct and complete, with the exception that interest has not been calculated upon the amount due. This statement shows the amount of libellants' claim in the case of The London Assurance to be $10,451.34, with interest to be added; and says that this statement was submitted to the Company as part of the libellants' proofs of loss.

A similar statement showing the amount of libellants' claim against The Manheim Insurance Company is also produced, and is believed to be correct and complete, with the exception that interest is not added to the amount claimed. The statement shows the amount claimed from The Manheim Company to be $5,463.68, interest to be added. Marked "Exhibit B, October 25, 1893."

These statements appear in print in respondents' printed answer, pages 8 and 20.

Mr. Tilton offers in evidence certificate of insurance marked "Libellants' Exhibit D, W. H. S, Jr., March 10, 1892," printed on page 6 of libellants' book, issued by The London Assurance in this case, No. 8 of 1892.

Also certificate of insurance "Exhibit E, W. H. S., Jr., March 10, 1892," issued by The Manheim Insurance Company in this case, and printed on page 12 of case No. 9 of 1892.

Adjourned till Thursday, November 2, 1893, at 11.30 a. m.

THURSDAY, November 2, 1893, 11.30 a. m.

Present.—THE COMMISSIONER; MR. TILTON.

MR. RONEY appeared on behalf of MR. HENRY, who is ill.

Mr. Tilton states that owing to Mr. Henry's illness and absence he will offer no testimony at this meeting, and will simply produce and leave with the Commissioner a roll of bills (numbered by the Commissioner from No. 1 to No. 92, inclusive), being the vouchers received from Messrs. Peter Wright & Sons, the ship's agents, upon settlement with them of their general average and other charges. These bills may be examined by counsel or representatives of the parties, under such conditions as the Commissioner may prescribe, but they are the property of Messrs. Peter Wright & Sons, in part; and libellants have agreed to return them to Peter Wright & Sons on their call.

Other bills will be produced covering the disbursements and charges of Lawrence Johnson & Co., the originals of which have not yet been found.

Mr. Roney, on behalf of Mr. Henry, states that the production of these bills is not to be considered as waiving proof of these bills.

Mr. Tilton understood that the purpose of the call by the other side for the bills, and their production to afford an opportunity for their examination, was to avoid the necessity of other proof, except as to such bills as should be disputed.

Adjourned till Wednesday, November 8, 1893, at 3 p. m.

WEDNESDAY, November 8, 1893, 3 p. m.

Present.—THE COMMISSIONER; MR. TILTON.

Mr. Roney sends word that Mr. Henry is still unable to attend.

Adjourned until Wednesday, November 15, 1893, at 11 a. m.

WEDNESDAY, November 15, 1893, 11 a. m.

Present.—THE COMMISSIONER; MR. LEWIS; MR. RONEY, who states that Mr. Henry is still unable to attend.

Adjourned till Wednesday, November 22, 1893, at 11 a. m.

WEDNESDAY, November 22, 1893, 11 a. m.

Present.—THE COMMISSIONER; MR. LEWIS; MR. TILTON. WILLIAM PARKIN, ESQ., appears on behalf of The London Assurance and Manheim Insurance Companies.

R. WINDER JOHNSON, affirmed.

By MR. TILTON:

Q. What is the name and business of your firm, and where are you located?

A. Commission business. We call ourselves merchants and bankers, and we do business at 209 South Third Street.

Q. Your firm name is what?

A. Lawrence Johnson & Co.

Q. Do you know the libellants in this case?

A. Yes, sir; we know the libellants.

Q. I believe you sold them this cargo?

A. We sold the cargo.

Q. To them?

A. Yes, sir.

Q. Did you take any part in the labors which were employed for the preservation of this cargo after it arrived in its damaged condition at the port of refuge in Boston?

A. Yes, sir; we superintended about everything that was done in the separation and protection of the cargo until the final selling and disposing of it.

Q. Beginning with looking after the cargo, from what time, not in point of date?

A. We began about January, early in January, 1891.

Q. Was that with the discharge?

A. That was with the discharge. We were directly represented, went on ourselves and had our man there during all the time of the discharge of the cargo into lighters, so that we superintended every bushel of it as it came out.

Q. And your superintendency of it continued until what time?

A. Until the cargo was entirely out, and even until it was disposed of afterwards.

Q. That occupied a period of what?

A. Months. I forget the exact date, but she put back in distress in December, 1890. I think it went on into the next March.

Q. In whose interest were you acting in doing all you did do in connection with this damaged cargo?

A. We were acting for the protection and benefit of the cargo, first, and we also naturally represented our friends abroad, but mainly we were taking care of and protecting the cargo, as every one else interested deserted the cargo and turned it over to us, in fact.

Q. What do you mean?

A. The underwriters refused to have anything to do with it. We gave them every opportunity to look into it. They refused, and our own agents on the other side, of course, left everything in our hands here, and we were compelled to look after the cargo and protect it.

Q. For the benefit of all parties interested?

A. For all concerned.

Q. Did the underwriters on the cargo at that time recognize their liability for the loss and damage to the cargo, or deny it?

A. They denied it.

Q. Was a tender of abandonment of the cargo to them made?

A. It was in proper form to every underwriter interested in the cargo.

Q. Did they accept it or refuse?

A. They refused it.

Q. Can you state whether from time to time the underwriters were informed of the various steps taken in relation to this cargo?

A. We had quite a long correspondence, spreading over months, with the underwriters. The exact details, of course, of attending to the cargo were not communicated to them, but, in a general way, they were told everything, and my recollection is that they allowed some of our important letters to go months without reply.

Q. During the earlier stages of the work in connection with this cargo, state whether the agents of the ship participated in what was done for its preservation, and who the agents were?

A. The agents of the ship were Peter Wright & Sons, of Philadelphia. They immediately took charge of what they considered their interest, and in fact we were working together for the same purpose—the preservation of the cargo, as far as that went.

Q. Did they, while so acting, contract bills and expenses in relation to this cargo and its preservation?

A. They did for the discharge of the cargo and for all the bills pertaining to it up to the time of the separation of interest.

Q. By separation of interest you mean when you had effected with them finally the agreement for the abandonment of the voyage?

A. Yes, sir; between the vessel's interest and the cargo's interest.

Q. That occurred when?

A. Towards the end of March, I think. In that agreement a date is mentioned, I think, to turn over the cargo. It is in March. The agreement for the termination of the voyage having been executed on the 27th of

February, 1891, and the formal transfer of the cargo from Messrs. Peter Wright & Sons, representing the ship, to ourselves, representing the cargo, was made early in March, about March 3d or 5th.

Q. State in a general way what expenses the bills contracted by Messrs. Wright & Sons covered?

(Objected to.)

A. I might state that the most important bill of all was, of course, that pertaining to the discharge of the cargo and keeping it in lighters until a decision was arrived at whether to continue the voyage or dispose of the cargo. That ran up into thousands of dollars. The Towboat Company in Boston did it, and while Wrights, of course, directly made the contract, I went personally to Boston. I went to the Company and went over every item of that bill and assured myself that better terms could not have been made with them. That I did.

Q. Then, about the treatment of the grain in the elevator, and all that?

A. I also went through the elevator and saw the grain and satisfied myself that the best possible means were being used in Boston for the preservation and protection of the grain.

Q. Did you ascertain their charges and inquire into them?

A. I did; and what was more, I discovered a lot of screenings that were thrown out of the grain in being cleaned, which had not been accounted for, and never would have been heard of but for my trip to Boston, which I saved. It amounted to a few dollars and was turned into the general interest.

Q. State whether, upon the discharge of the cargo from the *Liscard*, it was put directly into the elevator, or whether expenses were incurred for storage and lighters, and of that description?

A. It was all originally put into lighters alongside the vessel.

Q. Did that involve expense for chartering lighters?

A. Yes, sir; very heavy expense. We had many difficulties to contend with. In the first place, the elevator at first absolutely refused to take the grain in.

Q. Can you remember about how many lighters there were in which this grain was put?

A. I would not like to state. My impression would be something like ten. Really I do not know how many there were. The bills even specify the names of the lighters.

Q. Can you state whether some part of the wheat so stored in the lighters was more badly damaged than that which was put in the elevators for treatment, and whether it was in its damaged condition susceptible of treatment?

A. That was the object of dividing it into different lighters or boats. The very badly damaged wheat was put by itself in certain boats. That which was moderately damaged was kept by itself in other boats, and the best wheat of all was again put in a third class of boats.

Q. Did the very badly damaged wheat continue in the lighters up to the time of final disposition?

A. That there was no way of disposing of, as the elevators even to the end held out they would not take it into the elevators. It would damage the entire grain in the elevator. It would ruin their reputation for handling grain, and they naturally could not put through black (it looked like manure), put through stinking black grain through the machinery that handles sound grain, without damaging the entire grain that would follow it.

Q. There was one barge load of that?

A. There were two barges that were exceedingly bad.

Q. In the discharge of the grain from the ship, state whether the different lots were kept separate, and whether that involved additional expense, and considerable expense, or not?

A. There was a great deal of clerical work in that very connection, and in separating the lots from the dif-

ferent portions of the ship, as they came out, keeping account of them, and following that, not only into the lighters, but through the elevators and elevator-bins, and we got statements from the manager of the elevator, following up every lot, all of which is shown in that adjustment book, and, of course, anyone can see that is the result of our labor. You can see by that that it was carefully done and required a great deal of labor.

Q. The lots you say were kept separate in the discharge and subsequent handling and treatment of the grain?

A. Yes, sir.

Q. Were the lighters employed necessary for the purpose of keeping the grain properly separated; I mean the different lots?

A. Naturally.

Q. State in a general way the process of re-conditioning to which the grain was subjected.

A. In addition, you mean, to the separating as it came out of the vessel, because that was on first re-conditioning, you might say. It came out in immense lumps from the vessel. Some of it stood up in the vessel feet high. When the dry grain was taken from it, it would fall and could be shoveled away. Then the wet grain would stand up like pyramids.

By Mr. Parkin.

Q. Do I understand you are speaking now from what you saw yourself?

A. A great deal of this elevator was visited by myself. The boats were visited by myself. Then we had our own men, in addition, on board the deck of that vessel while every bushel of it was being discharged.

By Mr. Lewis:

Q. You mean you saw the grain caked and hard?

A. I saw that in the lighters, myself, in addition. I was not on the vessel all the time the grain was discharging.

Q. You saw the lumps and masses of grain?

A. Yes, sir.

By MR. TILTON:

Q. Is that a condition which grain experts describe as caked?

A. Rotten, I think they call it.

Q. If the wheat had not been promptly discharged, and the very badly damaged portion separated from that which was not so badly damaged, what would have been the result to the wheat?

A. The whole cargo would, in course of time, have become one caked mass, so that you could not have gotten it out, except with a pick-axe. It spreads.

Q. Would the deterioration have gone on slowly or rapidly?

A. Quite rapidly. It was soaking. I think they reported at the time several feet of water in the bottom of some parts of the hold.

Q. Would the contact of the portions of the grain not badly damaged with the grain which was more badly damaged result in further deterioration of the better part?

A. Decidedly. It spreads. Grain absorbs moisture like a sponge, somewhat; and, even as it is, when that cargo came out, the best of it all had a smell on it, the very dryest portion of it.

Q. Then, in addition to the separation which was made in the lighters, what was the process of treating it in the elevators?

A. Then, the portions that were the best, that the elevator would accept, were put through the elevator, broken up where they were slightly caked, separated into bins, and the very handling keeps it purified, and prevents deterioration and an increase of the musty smell in it. It was handled over the elevator several times in order to keep it as good as possible.

Q. What is the process of handling in the elevator?

A. They slip it over belts; slide it over belts.

Q. Let it fall?

A. Yes; let it fall; remove it from one bin, then take it back into another bin.

Q. As I understand, it is elevated to a height and allowed to fall, so the air goes properly through it?

A. Yes, sir; and shot around through pipes and over belts.

Q. That takes the moisture out?

A. It breaks it up and helps dry it, and prevents it from becoming more musty.

Q. Now, in this process of treatment in the elevator, was the grain merely handled once or twice in the elevator, or continuously handled in that way?

A. Some of it was handled repeatedly.

By Mr. Lewis:

Q. According to the extent of its damage by sea water in the first instance?

A. Naturally; yes, sir.

By Mr. Tilton:

Q. Can you state whether a survey, or several surveys, were had upon the cargo by competent grain experts?

A. There were several surveys held, and the most competent men were gotten to attend to it, both in Boston and some sent on, I believe, from Philadelphia.

Q. Do you remember who went from Philadelphia?

A. Our chief grain inspector, Mr. Foering, went on from Philadelphia. He was there twice.

Q. What of his competency to act in such a survey?

A. He has been our chief inspector in Philadelphia for a great many years, certainly fifteen, and that implies a great deal, because a man must be a professional really in that line to occupy such a position.

Q. Were men of similar or equal competency from the Boston Commercial Exchange upon the survey?

A. Yes, sir; also employed, although Boston is not so great a grain center, you know, and we sent on our own man from New York who belongs to a firm that handles, I suppose, three-fourths of all the damaged grain in the port of New York. We had him there to look out for the interests of the cargo and report to us.

Q. Are these the surveys to which you refer copied in the adjustment?

A. Yes, sir. I think a copy of the adjustment was served upon each one of the underwriters.

(Objected to).

(Book handed to Mr. Johnson, entitled "Adjustment of the general average and special charges, steamship *Liscard*, New York and Lisbon.")

Q. What is that book?

A. This is the adjustment as made up by the adjusters here in Philadelphia, Messrs. Johnson & Higgins. This is the adjustment to which I have reference.

MR. PARKIN: I must ask to have that answer stricken out. Mr. Johnson only knows, of course, from hearsay, that this is the adjustment. It is served upon him possibly and received by him as an adjustment, but his statement that it is an adjustment made up by the adjusters does not prove the adjustment. It is not competent.

THE COMMISSIONER: I think the witness may refer to this as a document which he holds in his hand. It will be for subsequent consideration whether you can prove it. You can call it what you choose. You may have to prove it; if you can prove that your case depends upon it. I do not understand that there is any doubt that this copy represents the adjustment which was made.

MR. PARKIN: I do not want to have it go on record as proved.

(Counsel for libellants state that they will follow up the present evidence with further proof, if desired, of the adjustment.)

MR. PARKIN: I will withdraw that objection.

Q. What average adjusters were secured to prepare the adjustment in this case?

A. Messrs. Johnson & Higgins.

Q. By whom were their services engaged?

A. By the ship. By all the parties in interest, I think, consenting to the employment of these adjusters. I know the ship's agent here did, and I think many of the underwriters themselves consented to it.

(Objected to.)

Q. Was there at any time objection made by anybody in interest to Messrs. Johnson & Higgins acting as the adjusters?

A. Not to my knowledge.

Q. Did they prepare an adjustment and submit it to you as the result of their employment and labors in the case?

A. They did.

Q. How many copies were made out, do you know?

A. No. A limited number. We found it difficult to obtain as many as we required even; but I think there were fifteen or something about fifteen made up.

Q. Please state whether the book you hold in your hand, and to which you have already referred, is one of them?

A. This is one of them.

Q. Do you know whether a copy of that was served upon the underwriters in this case?

A. Yes, sir; it was served upon one or two of the underwriters with a request that they should pass it on to the others. My recollection is that The Manheim Company is one of those companies that got it, one of these now in question. The London Assurance I am not positive of; but all have had it or have been notified it was given to the other underwriters in interest and they could have it when they desired.

Q. And it has been in the hands of counsel for the other side for how long to your knowledge?

(Objected to.)

A. About two years.

Q. What is the reputation of Johnson & Higgins as adjusters?

A. There are none supposed to be better in Philadelphia or New York.

Q. What papers were placed in the hands of Johnson & Higgins for the purpose of making up the adjustment?

A. All the original documents were given to them. They checked off everything, so far as our bills went, I know; the original papers with the exception, of course, of calling up over the telephone or something of that kind, petty bills, but I mean every bill that amounted to anything, they actually saw or had in their hands.

Q. And used for the purpose of making up the adjustment?

A. Yes, sir.

(Objected to.)

THE WITNESS: The evidence is in the book that they did use them because they agree with the bills.

Q. The papers so submitted to Johnson & Higgins included what? Just state in a general way.

A. All the bills of elevator charges for reconditioning, lighters, insurance, both while in the lighters and in the elevator, charges for the superintendents sent on to Boston to look after the cargo, cables.

Q. All bills contracted by Messrs. Peter Wright & Sons?

A. All the bills contracted by ourselves especially, and also those by Peter Wright & Sons.

Q. Your charges?

A. Our charges.

Q. All the bills contracted by Peter Wright & Sons and their charges; is that correct?

A. Yes, sir.

Q. What about the original surveys and agreement?

A. The originals or certified copies were shown to the adjusters.

(Batch of bills already produced before the Commissioner and marked by him from No. 1 to No. 92, inclusive, handed to witness.)

Q. Please state what those bills are?

A. These are the bills, I believe, which were made by Peter Wright & Sons, given by them to the adjusters, and afterward numbered as they are here and given to us for any necessary purpose.

MR. PARKIN: I ask to have the first part of that stricken out. Mr. Johnson does not know and cannot know that those bills were paid by Peter Wright & Sons, at least some of them. He cannot know that Peter Wright & Sons gave them to the adjusters, nor can he know, except from hearsay or looking at them, that they relate to this matter at all.

THE WITNESS: I personally received these bills from Peter Wright & Sons as the bills which they had given to the adjusters.

Q. State whether you have made a careful examination of those bills?

A. We checked off all these bills at the time that we settled with the Wrights.

Q. Did you go over them for the purpose of satisfying yourselves of the accuracy and propriety of the charges?

A. Certainly, that was our object.

Q. Did you spend little time and trouble and labor in that connection or a great deal?

A. It lasted just as long as our dispute with Peter Wright & Sons did, and we spent an immense deal of time in checking and making sure everything was as it should be.

Q. Your controversy about the bills and examination of them covered a period of how many months?

A. From the final settlement in March, 1891, until, I think it was, the end of October, 1892. It was not only to satisfy ourselves that those bills were correct, but we really had always in mind to make the best bargain we could, aside from that, with the people and to drive them to compromise by withholding money or any other means we could use, in order to get some advantage out of them. Of course, we had legal advice as to all that we did.

Q. Are the bills receipted?

A. The bills are receipted.

Q. Are they originals?

A. Most of these I have noticed are originals. I have not examined every one just now. They are originals or duplicates, I think, in every case.

Q. Were they presented to you by Messrs. Wright & Sons as bills paid by them in connection with this cargo?

A. They were.

Q. Did you have personal knowledge that the services and labors and expenses to which those bills relate were services and expenses actually incurred?

A. Yes, sir; all the very large items we had personal knowledge about, and we also inquired about the others. The fact I gave you a few minutes ago, we checked every important bill in Boston.

By Mr. Lewis:

Q. You had been to Boston and made an examination of the expenses incurred?

A. Yes, sir.

By Mr. Tilton:

Q. As to the important bills in that batch, state whether you had knowledge of the terms of the contracts on which the bills are based?

(Objected to.)

(Mr. Parkin states that he is willing to admit, for the purpose of the present examination, that these bills were paid by Peter Wright & Sons, subject to his right at any future stage to call for proof of payment of any particular bills which he may specify.)

Q. After such examination of the bills as you have testified to, and after the long period of negotiation with Messrs. Wright & Sons for their settlement, please state whether you did pay the cargo's portion of these bills, and if so, when you made the payment and what was the amount and how much abatement from their amount, if any, you secured as the result of your negotiations with them?

A. We settled with the representatives of the vessel all claims against the cargo, so that nothing is now pending. From the bills, as originally made, we obtained an abatement.

Q. Can you, by referring to the papers I now hand you, state what abatement you secured, and when the settlement was made?

A. We obtained an abatement of $1,450 and interest, amounting in all to $1,534.17, from the bills of Peter Wright & Son, after treaty with them, and repeated dealings, both direct and through attorneys, from the time of the separation of interest in March, 1891, up to the end of October, I think; this is the twenty-eighth or twenty-ninth day of October, 1892, when the final settlement was made with them.

Q. Have you a statement showing the amount of the abatement, and when was that made out?

A. This is the statement. It is dated October 27, 1892.

Mr. Tilton: As a memorandum merely, I would like to offer that.

Q. Made out at that time?

A. Made out at the day of settlement; yes, sir.

Q. Please state the amount paid in settlement. State also if you have a receipt which you can produce, showing the amount?

A. Here is the receipt, signed by Mr. Neill, of Peter Wright & Sons, for $15,579.37, dated October 29, 1892.

Q. State whether you paid him that amount of money on that occasion, in settlement of the cargo's portion of these bills?

A. That is the amount we paid. That is their receipt. The bill, as originally rendered by them, amounting to over $17,000, is there, too. The bill, as originally rendered by Peter Wright & Sons, amounting to $17,113.54, I also produce. I also produce an agreement made upon the same date of our payment, under which we agreed to release and protect the said steamer and owners from all bills and claims by cargo against the steamer in the nature of average charges incurred by them. That agreement is signed by ourselves, and also by Peter Wright & Sons.

(Mr. Tilton offers in evidence exhibits marked "Libellants' Exhibits, Nos. 100, 101, 102 and 103.")

By THE COMMISSIONER:

Q. How did you arrive at the proportion of the bills that was to be paid on account of cargo?

A. That was based upon the adjustment as made by Johnson and Higgins.

By MR. TILTON:

Q. Where are the originals of the bills incurred by you for your expenses and charges?

A. We handed those to the adjusters, Johnson & Higgins.

Q. State whether you have called upon them.

A. We have called upon them, and they do not seem certain exactly where they are, but think they were forwarded to England to settle some cases there by the ship, but we have duplicates in every case which can be shown.

Q. Have you gone over this adjustment made by Johnson & Higgins carefully ?

A. Yes, sir.

Q. Many times ?

A Yes, sir; several times.

Q. Please state whether or not it contains copies of the bills as presented by you.

A. Yes, sir; it contains our bills as presented with one small exception. I remember there were three or four cables checked off and they reduced our bill as presented by three or four dollars, something of that kind. Every other bill, I believe, is correct. You have some originals. In nearly every case where we took receipts we took originals and duplicates. I now produce the duplicate originals. Of course, the bill for my own charges is not among them.

Q. Did you present a bill to the adjusters for your charges ?

A. Yes, sir.

Q. Does that bill appear in the adjustment ?

A. It appears in the adjustment.

MR. TILTON: The duplicate originals are offered.

THE WITNESS: Here is one case where we have not the duplicate original and I produce the check. The press copies are itemized bills of our cables.

Q. You find all the others to be duplicate originals ?

A. Here is another check where I have been unable to produce a duplicate original. We attach a copy of the surveyor's letter to us, and then the check we gave which has been put through the bank in payment of it.

By MR. LEWIS:

Q. The check is for a surveyor's charge.

A. Yes, sir.

Q. $10 ?

A. Yes, sir.

MR. TILTON: These are produced and offered in evidence, marked 104 to 111 inclusive.

(Papers shown witness.)

Q. Have you produced the originals?

A. Those are the press copies of this same thing. We got these from the adjusters afterward.

Q. Of the account sales for the damaged cargo?

A. Yes, sir. These are the originals given to the adjusters for the purpose of settlement, giving the itemized sales and prices and expenses from which they took the account, as it appears in the adjustment. We got these back from the adjusters, and we had in our possession press copies, which are also here.

Q. State whether a copy of the account sales appears in the adjustment?

A. A copy of it appears, a little changed, of course, in its form.

Q. Do these account sales of the damaged wheat show the price realized for the wheat at the sale?

A. They do.

Q. Where was the sale made, and by whom?

A. The sales were made by ourselves, through various brokers that we employed. Some we sold in Boston and some of it had to be brought around to New York. In Boston, after diligent search, we could find no one who could use the very worst damaged portion of the cargo, as there are no starch factories there. In fact, they recommended us to throw it away as manure in Boston, because there was no buyer there for it. That portion had to be brought around to New York in order to sell it.

By MR. LEWIS:

Q. Then you, instead of throwing it away as manure, did sell it in New York?

A. We sold it in New York. It was all sold at a price.

Q. That brought a profit which you have accounted for in the account sales?

A. We have accounted for it. It all appears in these accounts.

By Mr. Tilton:

Q. Who made out these accounts?

A. A clerk in our office.

Q. Compiled from what?

A. From bills and accounts received at separate times from the various brokers, through whom we sold, and from letters.

Q. Are they correct?

A. They are correct.

(These account sales are offered in evidence and marked 112 and 113.)

The Witness: Those are account sales of what is termed in this case "Bills of Lading 1 and 3."

Q. Do those bills of lading, or not, cover the wheat concerned in this controversy?

A. The first and third do cover it.

Q. What was the amount of the charge made by your firm for your services in the care, custody and preservation of this cargo?

A. $1,500.

By Mr. Lewis:

Q. Is that, or not, a reasonable and proper charge for your services in the premises?

A. It is a most moderate charge, considering the length of time and number of opponents we have had to contest with.

By Mr. Tilton:

Q. State in a general way for what services that charge was made by your firm?

A. That brings up so many thoughts, it is hard really to say. It means daily labor almost from Christmas, 1890, to November 1, 1892, holidays included. I have even come down over this case on Sunday, a thing that I never

have done for anything else; and it is journeys to New York and Boston, correspondence to England and Portugal, everything relating to the settlement of the details of that cargo and the care of it, and then fighting everybody we had to come in contact with in relation to it.

Q. You mean by "fighting of other interests," the effort to secure a proper adjustment of these bills and expenses?

A. Exactly; everything.

Q. For the preservation of the cargo?

A. Yes, sir; for attending to the interests of the cargo for every one interested and concerned in the case.

By THE COMMISSIONER:

Q. So that it includes that of your employés as well as yourselves?

A. Naturally.

By MR. TILTON:

Q. Is that charge, or not, made under the "sue, labor and travel" clause of the policy?

(Objected to.)

A. As I understand, it is made under that.

Q. I wish you would state whether it is a charge made for your services in looking after the preservation of the cargo, its care and safekeeping, reconditioning, getting it into marketable shape as damaged wheat, or whether it is a charge which your firm makes as agents simply of the owners of this cargo?

A. It is made for our labor in attending to the cargo and assuming all the responsibilities and risks. They were enormous. We had to practically guarantee our buyers. We delivered the grain in many cases. We had to choose the people and know that they could pay us.

By MR. LEWIS:

Q. That is the damaged grain?

A. The whole cargo to be sold. If we had not been paid for that, do you suppose the loss would have fallen

upon any one else than ourselves if we had sold it to improper people? Again, where we had to ship it around to New York we had to deal with underwriters to see at what rate we could insure that. We tendered the insurance to some of the underwriters in interest in the case, and they absolutely refused to reinsure their own stuff around from Boston to New York. The details of this case are really perfectly fabulous, the amount of work connected with it.

Q. Do you refer to details of labor in handling the cargo and getting it in condition for sale.

A. Handling it, getting it in condition, disposing of the cargo and treating with those in interest.

Q. What responsibility did you assume in getting the charges made by the ship against the cargo adjusted, bonds given, moneys deposited, etc.?

A. On final settlement you mean?

Q. Prior to final settlement.

A. Before we could get the cargo to dispose of it to the best buyers and finally reconditioned it we were compelled to pay, under a compromise, freight amounting to $3,600 and deposit in bank $12,000 in cash.

Q. Twelve thousand dollars in cash to secure what?

A. To secure all claims of the vessel, the bills which had been incurred by the vessel and her representatives against the cargo, and in addition to that $15,000 more bond for any further bills that $12,000 might not be sufficient for, and to produce all the copies of bills of lading which might at any future time be brought up as a claim against the vessel. We had to guarantee the production of them from bankers or people in Europe or whoever held them. To release the ship absolutely from any future claims we had to give a bond of $15,000.

Q. State whether you found those to be necessary steps to be taken by you in adjusting the ship's claims against cargo?

A. We had treated for weeks to get the cargo on

better terms, and by legal advice in the end, we finding it absolutely impossible to do better, we were compelled to grant these conditions.

Q. Now, about the payment of freight. Was that made or not with the consent or knowledge of these underwriters?

A. It was. The underwriters were notified, and we have a letter from attorneys for the underwriters practically consenting that this shall be done. I produce the original agreement signed by the underwriters assenting to the payment. (Agreement marked 114.) I also produce receipt from Peter Wright & Sons for $3,600 in settlement for the freight; also the receipt of the Wrights for the $12,000 cash deposited in bank as security for all claims of ship against cargo, and further I produce the bond for the $15,000. (Marked 115, 116 and 117.) I also produce the original agreement for the termination of the voyage, in pursuance of which the $12,000 deposited to secure charges of ship against cargo and the $15,000 bond and the $3,600 freight were given and paid. This is an agreement dated February 27, made in Boston, which has already been mentioned to-day. (Marked 118.)

Q. Was this agreement signed by the underwriters, consenting to the termination of the voyage and payment of $3,600 freight, the only agreement of the kind that was drawn, or were there very many agreements prepared during the period of negotiation for the termination of the voyage, do you remember?

A. There were several agreements proposed and prepared, but this is the only one actually executed.

Q. Do you remember whether drafts of agreements were submitted by counsel for the underwriters?

A. Yes, sir; there was a draft of agreement submitted by them.

Q. Prior to this one?

A. Yes, sir.

(Objected to.)

CROSS-EXAMINED.

By MR. PARKIN:

×*Q.* You said you sold this cargo to the libellants? Are they merchants in Lisbon?

A. They are merchants and millers.

×*Q.* When did you sell the cargo to them with reference to the time of shipment?

A. Shortly before; I do not remember the exact date.

×*Q.* So that it was their cargo when shipped?

A. It was their cargo when shipped.

×*Q.* When you say merchants do you mean to say that they buy and sell grain in the Lisbon market?

A. I believe they do; yes, sir. They have their own mill.

×*Q.* Do they sell imported grain, that is, grain that is sent from this country, do you know?

A. Not as a rule. I think they do it sometimes to accommodate other mills, but their main business is to import and mill for themselves and deal in native wheats, too.

×*Q.* You say you superintended the separation of the badly damaged from the less damaged wheat. Were you personally present in Boston during all that time?

A. Oh, no. We had some one in Boston to represent us.

×*Q.* Who was that?

A. He was an employee from Annan & Co., in New York. He is recognized as a grain inspector, and it was for the purpose of inspecting the grain, separating it and preserving it as far as possible in the separation.

×*Q.* Do you know how long he was in Boston attending to this?

A. Several weeks.

×*Q.* Do you know when his services began and when they ended?

A. They began when the steamer began to discharge and did not end until she was entirely out.

×*Q.* His services were before the voyage in breaking up?

A. Yes, sir.

×*Q.* Was there anyone in Boston representing Peter Wright & Sons?

A. Yes, sir.

×*Q.* Who was that?

A. They had young Mr. Young, P. F. Young I think his initials are, and there was some one else who also went out once, but Mr. Young was there most of the time. There is a special bill made for his services in this book.

×*Q.* Did he go there, do you know, when the vessel first put into Boston?

A. I think he did.

×*Q.* Did he remain there all the time she was there?

A. Quite constantly; yes sir.

×*Q.* Did he superintend the discharge of the cargo?

A. No.

×*Q.* I mean did he arrange for having the cargo discharged into lighters?

A. Yes, sir; he made arrangements of that kind and for insurance, but he is not a grain inspector, of course, and did not assume any responsibility of that kind.

×*Q.* But he made all the arrangements for having it discharged?

A. Yes, sir; he made the arrangements, in conjunction, I think also, with a representative of Johnson & Higgins, who was there at the same time. They were both aware of it.

×*Q.* They had the grain inspected by other inspectors?

A. By regular inspectors, recognized inspectors.

×*Q.* And those inspectors made reports as to what they recommended?

A. Yes, sir.

×*Q.* Those reports were made, I suppose, to Peter Wright & Sons?

A. To Peter Wright & Sons.

×*Q.* Those recommendations were carried out by Peter Wright & Sons?

A. Yes, sir; by the Wrights.

×*Q.* When did you say the cargo was finally delivered to you?

A. March 3d, I think, we found the date was; early in March, 1891.

×*Q.* When were the sales made? I do not think those accounts show.

A. I think the dates are on them, unless I am mistaken, but they were made quite promptly after that, within two or three weeks, I think.

×*Q.* And the grain was delivered under those sales within two or three weeks?

A. Yes, sir.

×*Q.* You cannot fix the date?

A. No; I have not got that in my mind now.

×*Q.* Have you a memorandum from which you can give it to us?

A. Yes, sir; I think they are all in there.

×*Q.* On those account sales which have been put in evidence there are certain dates in the first column. Do those relate to the dates of the sales made, or do they relate to the discharge of the lighters?

A. These are the dates of the warehouse receipts. If you will notice, it is specified here the number of warehouse receipts. Those are their numbers and these are their dates, showing the dates at which they were taken from the lighters into the elevator. Then, the sales are not here.

By Mr. Tilton:

×*Q.* You mean the dates of the sales?

A. The dates of the sales, but from the fact that these accounts are completed and rendered April 15th, and we only received the cargo on the 3d of March, it shows that there was not very much time lost.

By Mr. Parkin:

Q. Can you, and will you, furnish us with the dates when the sales were made and cargo delivered to the purchasers?

A. We can do that, but you must remember that the dates on which we sold are not the dates on which we received payment. We can give you the dates on which sales were made, if you want them.

×*A.* And the dates when the wheat was delivered to the purchasers?

A. Yes, sir.

×*Q.* Can you also give me the names of the purchasers of the wheat?

A. I think so.

×*Q.* If you will add that to your memorandum. When the cargo was delivered to you on March 3d, all the wheat which had been put into elevators had been re-conditioned at that time, had it not?

A. Yes, sir; mostly.

×*Q.* You did not have to attend to any re-conditioning?

A. Yes, sir; it was gone over again, a portion of it, afterward.

×*Q.* Do you know how much of it was gone over after that?

A. No; I could not say how much, but the elevator was constantly handling it. It was a question of daily examination, and if the wheat was thought dangerous they handled it over again.

×*Q.* Were you in Boston when that was done, after March 3d?

A. Yes, sir.

×*Q.* How long were you there attending to that?

A. Two or three days.

×*Q.* Do the account sales show how much was left in the lighters and sold from the lighters, and how much was put into elevators?

A. Yes, sir; the account sales name the lighters as they were sold. Two lighters were sold with their contents.

×*Q.* And all the other grain?

A. Was put through the floating elevator or the permanent elevator there.

×*Q.* You speak of some of the cargo being black and very badly damaged?

A. Yes, sir.

×*Q.* That was the grain in the two lighters which you mentioned?

A. Yes, sir.

×*Q.* I suppose the account sales will show how many bushels?

A. Yes, sir; it gives how many bushels there were in each of those lighters.

×*Q.* Did those two lighters contain only part of the grain which was brought to New York?

A. There was a third lighter. I really do not know now whether that third one was taken on to New York or not. There were three very badly damaged lots. Two of them were exceedingly black. The third was a little better. I do not recollect now whether that was taken to New York or not.

×*Q.* Is there anything in the account sales or in the documents which have been put in evidence in this case, which shows the grade of this wheat when it was originally shipped?

A. I think it is not in evidence, but you have the official certificate of inspection as No. 2 red winter wheat.

×*Q.* You can state it was No. 2?

A. It was No. 2 red winter wheat when shipped. It was bought and sold as such.

×*Q.* Do you know what was the market price of sound wheat of that grade in Boston at the time this voyage was broken up?

A. I could not say now without looking into it. I do not even know what that cargo cost per bushel without

looking into it. Wheat fluctuates so. Those are inspection certificates. That is the elevator wheat.

By Mr. Tilton:

×*Q*. On which the original shipment was made?

A. I suppose so; yes, sir. This is one of the inspector-in-chief, 33,000 bushels, that is one set of bills of lading, and the other 33,000 that is the other, and these are the certificates of wheat usually given by the elevator. Those are what are called documents in the shipping trade, certificates of inspection of quality of wheat. Those are originals. I produce the original certificates of the official inspector in New York showing the quality of the wheat shipped, and certificates of wheat given by the elevator as wheat, showing the wheat shipped on to the steamer.

(Marked 119 to 122 inclusive.)

By Mr. Parkin:

×*Q*. Were you in Boston yourself any length of time while the wheat was being re-conditioned before the sale?

A. Two or three days only.

×*Q*. Did you spend much time and labor over that work?

A. All that time was given solely to this work, as well as a great deal of time here in Philadelphia.

×*Q*. Did you spend much time here in Philadelphia over that work during that period?

A. A great deal of time. It was daily work for months.

×*Q*. After the wheat had been sold, can you tell me what was the nature of the labor you devoted to this work, its general character, and the time involved?

A. After that we had, of course, all our accounts to make up to put in to the adjusters, dealing with the underwriters in interest, notifying them, giving them copies of statements and accounts, serving them with the adjustment, and ever since that the constant contest kept up with the underwriters.

By Mr. Tilton:

×*Q.* Were your negotiations with the Wrights subsequent to that?

A. That comes in, too. We did not settle with the Wrights finally; the bills were not settled, as we saw today, until October 29, 1892, for the ship's interest.

By Mr. Parkin:

×*Q.* These services, then, as I understand it, after the sale of the wheat, related to the settlement of the various claims with the various parties who were concerned in interest?

A. Yes, sir.

×*Q.* And collecting the money which was due?

A. Collecting and settling bills undertaken by the ship's agent, and finally arriving at a settlement with them.

×*Q.* You do not know, I presume, of your own personal knowledge, by whom the adjusters were employed?

A. Yes, sir; I do to a certain extent, because we telegraphed ourselves to London, asking some of the underwriters (I think your Company) to consent to the employment of Johnson & Higgins, and we consented to their employment, and Peter Wright & Sons, the agents of the ship, consented.

×*Q.* You do not mean to say that The London Assurance consented?

A. I do not recollect what their reply to that was, but we have a written reply from them on the subject.

×*Q.* You say you think that the adjustment was served on The Manheim Company?

A. Yes, sir.

×*Q.* And as to The London Assurance, you say you are not certain?

A. I am not certain they got a copy of the adjustment, but I took it myself to The Manheim Company.

They kept it for some months and sent it over to New York, and the other Company was told where it was. I think your agents here have seen it.

×*Q.* Did you have personal knowledge of the services which were rendered by Mr. Young, of Peter Wright & Sons? Were you present in Boston with him?

A. No; not with him, but I talked to him over the telephone, and I know he was in Boston.

×*Q.* You know he was actively engaged there in looking after the vessel and cargo?

A. Yes, sir; we heard from him by letter, too, that he was there. We knew he was there.

×*Q.* You say you afterward paid the cargo's proportion of the bills which they rendered to you?

A. Which Peter Wright & Sons rendered to us.

×*Q.* How did you arrive at the cargo's proportion of the bills?

A. That was left in the hands of the adjusters as competent persons.

×*Q.* And you paid upon their adjustment?

A. Upon their adjustment.

×*Q.* Do you know whether that abatement which you have mentioned (the abatement you obtained from them) was deducted from their bills in making up that adjustment? Have you examined it to see?

A. No; it was not taken from the bills which we have here in evidence.

×*Q.* In preparing the adjustment?

A. They were already settled. Those bills were paid.

×*Q.* Was the adjustment made upon the basis of the bills originally rendered or on the basis of the bills with the abatement?

A. No; on the basis of the bills originally rendered and already receipted when this adjustment was made up.

×*Q.* So that no credit has been given in this adjustment for that abatement?

A. None whatever. We were doing what we could to earn our commission.

× *Q.* You have produced an agreement signed by the Insurance Companies in regard to the acceptance of this cargo by yourselves and payment of freight?

A. Yes, sir; the original is here.

× *Q.* That was signed, apparently, February 20th. That was before the voyage was abandoned?

A. Before it was broken up.

× *Q.* Do you know what the object in obtaining such an agreement from the Insurance Companies was?

A. In order to satisfy ourselves that they were content with what we were doing. Originally the vessel refused to give up the cargo without payment of full freight, and it was only by a great deal of quarreling and labor that we succeeded in getting them down to $3,600, which I think was one-half the amount of freight; and then, to be satisfied that you gentlemen would not finally say that we had not even then done our duty, we thought it was wise to get such an agreement.

× *Q.* Did the ship claim the right to carry the cargo forward?

A. She did. She insisted, at first, upon her right to carry it forward, and said she was going to do so.

× *Q.* The original port of destination was Lisbon?

A. Lisbon.

× *Q.* You thought, as I understand it from your testimony, that it was advisable to break up the voyage at Boston?

A. I only know this, for which the underwriters may thank me, that if the cargo had gone to Lisbon, under their laws—

× *Q.* I merely want your answer to that, whether that was your position?

A. I can cite cases of what was done in Lisbon. In our opinion it ought not to go forward to Lisbon for the reasons already stated in the printed testimony.

×*Q.* For those reasons you thought it ought not to go forward to Lisbon?

A. Yes, sir.

×*Q.* In making this agreement then, as I understand it, your idea was to have the underwriters assent to your action in that matter?

A. To our action; what we were doing.

×*Q.* You thought that possibly they might claim or take the same position that the ship had taken, that the cargo ought to have gone forward?

A. That amongst other things. We wished to have the underwriters know what we proposed doing, and have their consent to it, if possible.

×*Q.* In regard to these bills of Peter Wright & Sons, you do not personally know, I understand, for what all those bills were paid? You merely take them from the bills themselves?

A. I know most of them, and the important ones were actually paid, for I took the pains in Boston to go, for instance, to the underwriters' office, to the towboat company, which was the largest single bill of over $4,000, and get copies of the agreement made with the Wrights, and assure myself that the sums were correct. Some small bills, I have no doubt, I do not know personally about.

×*Q.* Such items as "cash paid to captain" you do not know about, but you take their statement?

A. I do not know anything about it.

×*Q.* You do not know what services the captain rendered personally?

A. Yes, sir; I know that he was very active in going about Boston. The poor man had been lamed at sea and had to have a carriage to go about in. In fact, everything that was done had to be with his consent, even arranging for the discharge of the cargo.

×*Q.* Of course, he was the responsible man for whatever was done?

A. Yes, sir.

×*Q.* It had to be done with his consent?

A. The Wrights, of course, did everything with his consent.

×*Q.* But you do not know personally that the amounts which are charged for his expenses are correct?

A. Oh, no.

×*Q.* You do not know what his expenses were?

A. No.

×*Q.* There is also among those, I think, a bill for service of a watchman. Do you know anything about the employment of that watchman?

A. Yes, sir; that was necessary to prevent stealing from the lighters during all the time it was discharging up to the time of separation of cargo.

×*Q.* Were you there at the time he was employed?

A. Yes, sir; he was employed up to the final separation as long as the lighters were there.

×*Q.* Was he employed on the lighters?

A. The lighters stayed alongside the ship or very close to it, all within sight.

×*Q.* And he was employed only on the lighters?

A. The lighters and deck of the ship.

×*Q.* To look after the grain?

A. To look after the grain at night.

×*Q.* What are these lighters?

A. They are large boats. Some of them are old, thrown aside canal boats and sloops. Some of them carried up to 8,000 and 10,000 bushels.

×*Q.* They are not steam lighters?

A. No; they have to be towed, all of them.

×*Q.* Do they have captains and crews of their own?

A. They had men put on board by the Company that owns them, but they can scarcely be called captains, I think.

×*Q.* Men in charge of them?

A. Yes, sir.

× *Q.* There are also some items of marine insurance. Do you know what that insurance was for?

A. Yes, sir; we did a great deal of it.

× *Q.* You did it yourself?

A. Yes, sir. We had to keep up the insurance after we got possession of the wheat until it was finally sold. What was in the lighters was a separate risk. It was discharged from the steamer, and lay there for months, some of it, and the old policies did not cover that risk.

× *Q.* That marine insurance insured the owners of the cargo?

A. It was to insure the wheat, the value of the wheat itself, for whoever might be interested; we did not know.

× *Q.* The marine insurance which I refer to is that which was charged in Peter Wright's bill?

A. Yes, sir; you will find some in ours, too. They settled all the marine insurance up to the time of separation.

× *Q.* What did that marine insurance cover?

A. It covered only the risk in the lighters of the cargo.

× *Q.* The cargo that was in the lighters?

A. After it was discharged from the *Liscard*.

× *Q.* Up to what date did it cover that?

A. Peter Wright & Sons, up to the date they transferred the wheat to us, and we covered it and paid for what followed.

× *Q.* Was the full value of the wheat insured?

A. On those lighters, you mean?

× *Q.* Yes.

A. I think it was. I am not sure whether we estimated the decreased value at the time. I could not tell you now really what amount was insured, but we insured what we considered the value, I am sure.

× *Q.* The value of the wheat at that time?

A. Yes, sir.

× *Q.* And in regard to some fire insurance which is also charged there, have you personal knowledge of what that was for?

A. That was when it was put in the elevator.

× *Q.* From what period did that run?

A. Those papers will show. I think it began about the 6th of February. Until it was finally sold, from the minute it was put in the elevator, it had to be covered by fire insurance.

× *Q.* That was the full value of the wheat?

A. Yes, sir; we insured what we considered the value of it.

× *Q.* Did you attend yourself to the fire insurance and marine insurance?

A. Yes, sir.

× *Q.* Did you attend to that which Peter Wright paid?

A. They paid it.

× *Q.* You did not effect that insurance for them?

A. No. I went to the Companies and got their terms afterward and extended it in some of those Companies.

× *Q.* Are these bills which you have presented and which are marked 104 to 111 your own bills? Do they cover all the charges which you make, with the exception of $1,500?

A. Yes, sir. We have bills here, or copies, for everything.

× *Q.* Those cover everything, do they, for which you charge, excepting the $1,500?

A. They cover everything. There is no bill for telegrams, postage and telephone charges between New York, Philadelphia and Boston, amounting to $79.50. There is also an attorney's fee of $500 which does not appear in these bills, and a bill for the attorney's expenses, $110. There is no bill for $70.91, my own expenses to Boston.

× *Q.* The first bill which you render there is one of Annan & Co. That was for inspecting the grain prior to the breaking up of the voyage as I understand it?

A. Yes, sir; I think this was before. You see the bill is rendered March 25th. Yes, sir; this is a lot put from a certain lighter named in the bill, the *Carlton*, into the stores.

× *Q.* That was before the voyage was broken up?

A. That apparently was directly after the voyage was broken up, because it is dated March 25th.

× *Q.* Was that the date when those services were rendered, do you know?

A. The cargo was turned to us March 3d. This was evidently a few days after the service was rendered.

× *Q.* He was employed by you, was he, to superintend the loading and delivery of that wheat from the barge *Carlton* to the Excelsior store?

A. Yes, sir.

× *Q.* There is also a further charge of Annan & Co., two others, one for inspecting 20,000 bushels of wheat at Boston, amounting to $50, and one for superintending the weighing and delivery from the steamer *Liscard* to lighters of 88,000 bushels?

A. That was the entire cargo.

× *Q.* The last one was the entire cargo?

A. Eighty-eight thousand bushels was the complete cargo as shipped.

× *Q.* Those services were then rendered before the voyage was broken up?

A. Yes, sir.

× *Q.* The inspecting of 20,000 bushels of wheat, do you know when those services were rendered?

A. Yes, sir; this was done directly after the voyage was broken up and for the two boats shipped around to New York, drawing of samples to sell on and inspecting whether anything better could be done with the two loads. He made a special trip to Boston for that purpose.

By Mr. Lewis:

× *Q.* The 88,000 bushels was services rendered as the cargo was taken out of the steamer?

A. Taken out of the steamer and put into the lighers.

By Mr. Parkin:

× *Q.* There is an item of $10 charged for survey and report on steamer *Liscard?*

A. That is the check for $10 that is here; Candage, $10, with a copy of his (Candage's) letter to us about his services and rendering his bill. That was March 10th.

× *Q.* That was before the vessel sailed from New York, was it?

A. That was in Boston. This, at all events, is his date, Boston, March 10th. She must have been still in Boston at that time.

By Mr. Lewis:

× *Q.* That was not before she sailed from New York but afterward?

A. It was in Boston after the cargo had been discharged.

By Mr. Parkin:

× *Q.* For what purpose was that survey made, do you recall?

A. I think that was in regard to the seaworthiness of the vessel and the amount of damage actually done to the cargo.

× *Q.* In regard to her seaworthiness at that time?

A. Yes, sir; her condition as she came into port and delivered the cargo and the amount of damage done. You see it describes here the exact condition in which he found the vessel. This is in order to ascertain that.

× *Q.* There were other surveys made, were there not, on the vessel?

A. Yes, sir.

× *Q.* Surveys called by the captain?

A. Called by the captain.

× *Q.* What date was that survey of Candage's made?

A. This bill is March 10th.

×*Q.* Do you know when the survey was made?

A. I think it was made just about that time. It was after the discharge of the cargo.

×*Q.* After the voyage was broken up?

A. No; the voyage was not broken up untill March 3d.

×*Q.* It was after the agreement for breaking up the voyage?

A. They had not abandoned their right to that cargo.

×*Q.* That was made, then, after the delivery of the cargo to you, under the agreement of February 27th?

A. I am not sure. I rather think it was made about the same time.

×*Q.* You do not know?

A. No; I could not say now whether this was made a few days after or a few days before.

×*Q.* A few days after or a few days before what?

A. Before the delivery of the cargo to us.

×*Q.* Do you know whether it was made before or after February 27th?

A. I could not, positively, say.

×*Q.* Do you know for what purpose it was made?

A. Yes, sir; to ascertain the condition of the steamer.

×*Q.* For what purpose did you wish to ascertain the condition of the steamer at that time?

A. We did not know, then, what course we might have to pursue in relation to the steamer in arriving at any agreement with her.

×*Q.* You wished to see whether she was in condition to carry the cargo forward?

A. Yes, sir; in condition to carry it forward, and the extent of the damage done to the steamer.

×*Q.* Now, in regard to these cables and telegrams to and from Europe, some of these apparently have been charged by the adjuster to general average, some to special charges on cargo and some to cargo owners. Can you tell me how they arrived at that division of them?

A. I think they divided the cables that we sent direct

to the cargo owners in Lisbon asking for authority from them how to act, or their agreement or consent to certain things, probably to the cargo alone. I think they made some such arbitrary distinction and divided it up. That I am not prepared to show you. They have marked "L" —"Lisbon or *Liscard*;" I do not know what they intended it for—all the cables that were submitted to them.

×*Q*. You were the agents for the libellants for arranging this?

A. Yes, sir; we were their representatives here in Philadelphia, as well.

×*Q*. And you had authority to act as you considered for their best interests?

A. Yes, sir.

×*Q*. Can you explain to me why there should be so much cabling between you and them in regard to these matters?

A. To explain an occurrence of this kind, the extent of damage to the cargo, the various surveys held and their recommendations, and to send back what would be a legal power in this country to act, and to instruct them to get their bankers to send the certificates of insurance and the copies, every one of them, of bills of lading, all required, of course, considerable explaining.

×*Q*. For what purpose did you telegraph to London?

A. Those were the bankers holding some of the documents, and representatives of the owners in Lisbon, as well, perhaps, as our communications to your Companies, advising them of the fact. I suppose they are included. We cabled your Company advising that she had returned in distress and tendering them afterward a bond. All that was done by cable.

By MR. LEWIS:

×*Q*. You cabled the other Companies also, did you not?

A. Yes, sir.

By MR. PARKIN:

×*Q.* There is a charge for the services of an attorney. I do not want to question the charges of Mr. Lewis, the amount, but I want to know for what purpose an attorney was sent to Boston in this matter?

A. I can say we had to employ an attorney from the fact that the ship was represented by an attorney, and, in order to arrive at a contract in legal form, which was done in Boston, the attorney had to be there.

×*Q.* Peter Wright & Sons were the agents of the vessel?

A. They were the agents of the vessel, and in some other way there was some other attorney, this Candage or a New York firm of attorneys for underwriters in England. There were underwriters on the hull in England that were interested, and they employed their attorneys in New York who were also there.

×*Q.* My question is why an attorney should have gone to Boston when yourself and Peter Wright & Sons were in Philadelphia?

A. The captain was in Boston and the circumstances were going on there. The cargo was there.

×*Q.* The agreement for breaking up the voyage was signed in the name of Peter Wright & Sons?

A. Yes, sir.

By MR. LEWIS:

×*Q.* At Boston?

A. Yes, sir.

By MR. PARKIN:

×*Q.* It was signed in their name?

A. In their name as agents for the vessel.

By MR. LEWIS:

×*Q.* It was signed by their attorney at Boston?

A. Yes, sir.

By MR. PARKIN:

×*Q.* The agreement for breaking up the voyage was made by Peter Wright & Sons?

A. Yes, sir; by their representative.

× *Q.* Between themselves and yourself?

A. Yes, sir.

× *Q.* Did you have any communication with Peter Wright & Sons about the breaking up of the voyage personally at that time?

A. We had a great many different meetings. We were writing to them frequently. We met them almost daily and we also had a number of formal meetings in their building here in regard to it, at which attorneys and all interested were represented.

× *Q.* Before that agreement of February 27th was signed, had you arranged with them here for breaking up the voyage?

A. They had submitted various contracts which they would accept, and we had turned them down, one after another, and demanded better terms. We had come several times almost to the point of an agreement, and then we could not agree on some point or other, until this final one was made in Boston. They first of all demanded very much larger concessions and securities than were even given them, which appear ample.

By Mr. Lewis:

× *Q.* They demanded a larger amount of freight, too?

A. A larger amount of freight, full freight at first, and a larger amount as security, and they absolutely refused to give up the cargo unless we produced before their eyes every copy of the bills of lading. We had to give bond afterward for that. They held various positions.

By Mr. Parkin:

× *Q.* That agreement, as I understand, appears afterward to have been signed?

A. It was executed finally in Philadelphia. The representative signed a kind of provisional agreement in Boston.

×*Q.* It was subject to approval?

A. It was brought on and signed in Philadelphia finally.

×*Q.* This charge of $70.91 for trip to Boston, superintending division of delivery, etc.,—those were your own expenses?

A. My own expenses; yes, sir.

×*Q.* There is another charge here for survey on the steamer *Liscard* in Philadelphia?

A. She came around to Philadelphia after that. After leaving Boston, after discharging her cargo there, she came finally to Philadelphia, and in order to get an accurate statement of her condition, and the break in her side, it was done here in Philadelphia.

×*Q.* That is the break in her side before she left New York?

A. Yes, sir.

×*Q.* That is the break you refer to when you say the break in her side?

A. Yes, sir; that was the collision break.

×*Q.* Have you stated when you paid Peter Wright & Sons?

A. The final settlement?

×*Q.* Yes?

A. That is already answered.

×*Q.* And you are going to furnish me with the dates of the sales?

A. I will find that for you; yes, sir; the dates of the sales of the wheat, the prices obtained, and the names of the buyers.

×*Q.* Do you remember the terms on which that wheat was sold as to time of payment?

A. That sold in New York was to be paid for after delivery and weighing there. That in Boston, what had been put into the elevator was to be paid for as it was delivered from the elevator. Some of it was sent to Liverpool by the people who bought it, and some of it was

shipped to other markets in the north of Europe, I do not know where now, but that was to be paid for as it was delivered from the elevator to the steamers.

×*Q.* All that in Boston was delivered into steamers to go abroad?

A. To go abroad, most of it, I think.

×*Q.* Do you know when you received payment for that wheat that was sent abroad?

A. No.

×*Q.* Can you tell me about the date of that?

A. There was so many different lots sold, I could not without referring to it. It was sold in different lots.

×*Q.* Would it be very much labor to give me the dates of those payments?

A. It probably would be a good deal, but I can have it done for you, just exactly as all the certificates are shown in the account, the itemized certificate from the elevator bins, the number of bushels in each. We can follow every one of them out until it was shipped.

×*Q.* I would like to know when you were paid for the wheat. There is among the Peter Wright & Sons' charges one for underwriters' agent. Do you know who that agent was?

A. That they paid?

×*Q.* Yes; that they paid. I mean, of your own knowledge, do you know anything about that charge?

A. Yes, sir; I think that item is the agent from Johnson & Higgins, because he was on in Boston.

×*Q.* Do you know personally how long he was in Boston or what he did there?

A. Yes, sir.

×*Q.* I am asking of your own personal knowledge, not from hearsay?

A. Yes, sir. He went there partly by our request. We had effected the insurance through Johnson & Higgins. Their relation was a very complicated one in this case as well, and their clerk was sent on almost directly

after the steamer arrived in Boston, and he remained there for some considerable time. We corresponded with him and he acted partially for us in the beginning.

×*Q.* Do you know personally what Companies he represented?

A. He must have represented them all.

×*Q.* You do not know? You have never seen any authority from them?

A. No; but in Philadelphia, Johnson & Higgins are the agents of the International Marine Insurance and three or four other Companies interested in this very cargo.

×*Q.* They are not the agents of the London, though?

A. Not of the London.

×*Q.* Nor of the Manheim?

A. No; but they are, I think, of all the others interested.

×*Q.* So that he represented the other Companies?

A. Yes, sir.

By Mr. Lewis:

×*Q.* Was not Mather agent for one of the others?

A. Mather was, that is true, and there is a Western Assurance Society of Toronto. They are the agents for the Western.

By Mr. Parkin:

×*Q.* You mean Mather?

A. No; Johnson & Higgins. Then there was also a International Marine Insurance and I believe they are the agents for that, but the insurance having been done through their office, they sent him on as representing every one interested.

By Mr. Lewis:

×*Q.* Do you know whether he went on with the consent of all the people?

A. He went on with the instructions of the underwriters' agent here; at least, for some of the underwriters, I do not know whether all.

By Mr. Parkin:

× *Q.* I see there is a charge here for commission on disbursements. Can you explain that item to me?

A. I do not think any one will lend you money and pay bills without charging you a commission on it.

× *Q.* Are these the commissions which you charged your principals?

A. We charge the cargo for having paid various bills. We charge a commission on it, naturally. That is, a commission on all funds that we disbursed.

By Mr Lewis:

× *Q.* In connection with the cargo?

A. Of course.

By Mr. Parkin:

× *Q.* These disbursements which are here amount to $17,260.70? Can you tell me generally what those disbursements represent?

A. Yes, sir; we paid into bank $12,000 cash in one item. We paid $3,600 freight in one item. Then we had the bills besides. That was all paid before we received a cent.

× *Q.* There is no commission charged there on the bill which you paid Peter Wright & Sons?

A. No; they charged that. That is on their bills.

× *Q.* You also charge interest, I see, on general average disbursements and special charges?

A. Yes, sir. That was estimated for the time I think the adjusters were at it until the settlement was arrived at. How they got at that exactly, it has not covered near enough. Our final bill to you will run up high in interest.

× *Q.* Did you not have funds in your hands to cover these things at the time you made disbursements?

A. No; not at that time.

× *Q.* There is a charge under the head of "allowances for commission for placing agents in funds." Will you explain that?

A. That, I think, is a charge entirely of Peter Wright & Sons for advancing funds immediately the vessel put back to Boston in distress.

×*Q.* Did you pay that to Peter Wright & Sons?

A. Yes, sir; it was rendered amongst other items in their bills. We settled with them on the basis of this adjustment.

×*Q.* There is also, I see, an allowance for collector's fee, commission, collecting, general average and special charges of 2½ per cent. Is that all Peter Wright & Sons?

A. Yes, sir; I think so. What page is that on?

×*Q.* Page 185.

A. Oh, no; the adjusters got that. That is my impression, at least.

×*Q.* You do not know about that?

A. No.

×*Q.* There is also an adjuster's charge here, just before it, you see?

A. Then I may be mistaken about the second one.

×*Q.* Have you received any part of that?

A. We received no part of it.

×*Q.* Then the commission on the special charges, you do not understand what that refers to? It is that same page. It is that item on page 185, "collector's commission, collecting, general average and special charges." Can you tell me what that means?

A. That is a charge of Wright's. I could not tell you now; no.

×*Q.* Peter Wright & Sons had nothing to do with special charges, had they?

A. There were special charges in many cases on the cargo. They paid bills. They were divided into special charges afterward. They paid many bills that were partly for cargo.

×*Q.* But they did not collect those special charges?

A. They collected them again from us, of course. That was a bill against cargo. A question of that kind

we could have an explanation of at once from the adjuster himself.

×*Q*. But you do not know. You are only surmising now?

A. That is all.

×*Q*. You have no knowledge on the subject?

A. Not at all.

×*Q*. You charge here a sum of $1,500 for your services, and also, there is a charge of commission on disbursements, and so on?

A. Yes, sir.

×*Q*. May I ask if that is the charge which you make to your principals for services rendered to them?

A. It is a charge we make to those interested.

MR. LEWIS: Which charge?

MR. PARKIN: Both charges.

THE WITNESS: They both go together, to whomever may be interested in that cargo.

×*Q*. So you would like to get that from your principals if the Insurance Company does not pay it?

A. I certainly want to get it somewhere for my labor.

×*Q*. Supposing your principals were uninsured, would you make the same charge to them?

(Objected to.)

A. You mean if we still represented those people here and we had not insured the cargo?

×*Q*. Assuming that they had no insurance upon the cargo at all?

A. I do not care whether it is insured or not, I should certainly charge commission for my services.

×*Q*. And you would charge a commission on disbursements, would you?

A. Certainly.

×*Q*. To them?

A. Not to them, to the people interested in the cargo. You mean the owners of the cargo? I do not mean to

them, I mean those interested in the cargo, for the interest of all concerned.

×*Q*. You represented in this case the owners of a certain cargo? You were their agents?

A. Yes, sir; we were that also.

×*Q*. What else were you?

A. We were forced to be your representatives, the representatives of the underwriters.

MR. PARKER: I ask to have that stricken out.

×*Q*. The only people that you are employed by are the libellants in this case, are they not?

A. Yes, sir; we were employed by them. There were other duties which we think do not belong to them that we were forced to perform because the underwriters in interest refused to act.

×*Q*. What relation did you have to this cargo, excepting as the agents of the owners of the cargo? Assuming you had not been employed as agents of the owners of the cargo, what would you have had to do about this cargo at all?

A. No interest whatever in it.

×*Q*. Your interest, then, in the matter arose solely out of the fact that you were agents of the owners of the cargo?

A. Yes, sir; in that sense.

×*Q*. Assuming that you were acting, then, solely as the agents of the owners of the cargo, would you charge them with these same items that you have charged in here, and all of them?

A. I think so.

×*Q*. Is that the customary way, where you represent parties abroad in such matters?

A. When we are asked to perform extraordinary services we always make extra charges.

×*Q*. This cargo was insured free from particular average, "unless the vessel be stranded, burned or in collision?"

A. "Sunk, burned, or in collision."

×*Q.* The libellants have claimed that by reason of certain things which happened in New York harbor that warranty was broken, and the Insurance Companies became liable for the partial loss?

A. Yes, sir.

×*Q.* And for special charges on the cargo?

A. Yes, sir.

×*Q.* What I want to get at is, assume that warranty had not been broken, so that there was no liability on the Insurance Companies for special charges and partial loss, would you have charged exactly these same items to your principals in Lisbon?

A. I think so. I did not make up those bills with any such idea in my mind as you try to intimate. I charged those only as proper and moderate charges for the services rendered.

×*Q.* I want to find out whether you think that by reason of the fact that there was any insurance on the cargo for which the Insurance Companies are liable, other items of charges are proper to be made, which would not have been made if there had been no insurance. Have you made in your charges any charges which you would not have made if there had been no insurance on the cargo at all; or have you made any charges which you would not have made to your principals if they had not been insured?

A. No; I think not.

×*Q.* This cargo, after the voyage was broken up, was sold through brokers, was it not?

A. Yes, sir.

×*Q.* Did you, in addition to that brokerage, also make a charge for commissions on those sales?

A. Yes, sir.

By Mr. Lewis:

×*Q.* You did not make a charge for brokerage?

A. We made no charge for brokerage?

By Mr. Parkin:

×*Q.* You made a charge for commission.

A. Commission on sale of grain.

By Mr. Lewis:

×*Q.* But you made no charge for brokerage?

A. The brokers charged; we did not charge for ourselves.

×*Q.* They charged you?

A. They charged us as they do in all transactions of the kind.

By Mr. Parkin:

×*Q.* But you charged that brokerage to your principals as well as your commission?

A. Yes, sir; we do the same thing in shipping. For instance, we bought yesterday a cargo of over 100,000 bushels in New York for shipping. We paid brokerage on that and we charged our friends abroad our commission, of course.

×*Q.* Do you remember to what ports in Europe all this cargo was shipped?

A. Yes, sir; the worst of it that was shipped from Boston went to Liverpool. I think some of it went to Antwerp. Liverpool has the reputation of taking the worst trash in the world.

×*Q.* Was all the wheat that was delivered from the Boston elevators or sold in Boston sent to Europe?

A. It was sent to foreign countries.

×*Q.* To Liverpool and Antwerp?

A. Liverpool and Antwerp, I think, were the main ports.

Q. What was done with the wheat which was brought to New York?

A. I think it was sold to starch manufacturers, some little of it possibly to fertilizers. We sold it to a dealer in damaged grain. Some was sold for chicken feed, I think they told us afterward.

RE-DIRECT EXAMINATION.

By MR. LEWIS:

Q. Please look at the two papers I hand you, marked "Exhibits A and B, October 25, 1893, E. F. P., Commissioner," and tell me whether they are or are not the statements of your claim against these respective respondents?

A. Yes, sir; these are our claims at the date, of course, given on the accounts here, November 14, 1891, as based upon the adjustment then made.

Q. Of course, they do not include interest from that date to the present time?

A. No; there are interest charges since.

Q. Are these statements true and correct?

A. They are correct.

Q. They have been made out by yourself or under your supervision?

A. Under my own supervision, and these have been rendered to the Companies in interest. They have had them since November, 1891, in their possession.

Q. The various bills that you submitted to the average adjusters for expenses incurred by you in behalf of cargo were actually paid by you, were they?

A. They were actually paid.

Q. From your knowledge of services rendered similar to those for which these bills have been rendered to the adjusters, are you able or not to say that the charges are reasonable and proper?

(Objected to.)

Q. I refer to all of the bills paid by Lawrence Johnson & Co., not the Wrights' bills, all of your own bills?

A. Yes, sir; I am satisfied that we could not do better. We exerted ourselves to do so well.

Q. Now, in reference to the bills that were rendered to the adjusters by Peter Wright & Sons, are you able or not to say from investigations you made at Boston and elsewhere of these charges that they were also reasonable and proper.

(Objected to, because Mr. Johnson has already said that a large number of them he had no personal knowledge of the services rendered.)

A. I said rather to the reverse of what you say now. The most important number of them, the largest items, I did know about. The smaller items I did not know.

By MR. PARKIN:

Q. But the larger items, I understood you to say, you investigated?

A. I investigated and found that they were reasonable.

Q. Afterward?

A. Yes, sir.

Q. You did not know of the rendering of the services at the time, or what services were rendered actually?

A. Oh, yes.

By MR. LEWIS:

Q. At the time you settled with the Wrights upon those bills, there was a denial, was there not, of liability upon the part of these Companies here?

A. Yes, sir; there was.

Q. Now, in response to the prior question, are you able or not from such investigation as you were able to make in Boston and elsewhere, to say whether or not the bills that were paid by the Wrights that you settled with them for were reasonable and proper under the circumstances?

A. Yes, sir; we found them to be reasonable and apparently the best possible bargains had been made.

Q. In your settlement with the Wrights, I understood you to say that you secured an abatement of some $1,700?

A. $1,500.

Q. That statement was secured as a lump sum for all of the bills, as I understand you?

A. It was. No particular bill was specified.

Q. You have been asked in reference to the breaking

up of the voyage in Boston and the reconditioning of the cargo. Are you or not able to say from your knowledge as a wheat exporter that the reconditioning of the cargo and its disposal, as it was done in this case, was for the best interest of all concerned?

A. Undoubtedly it was necessary to handle it just as it was done.

Q. Are you able to say or not from your knowledge as a wheat exporter that the way in which it was handled showed the wisdom of the course pursued?

A. Yes, sir; it did.

Q. You have been examined in reference to the items of cash paid to the captain by Peter Wright & Sons, and included in the bills that you paid to the Wrights. The total amount of the sums paid to the captain as stated in the adjustment seems to amount to $180. I understood you to say that you were familiar with what the captain had done in Boston when you were there. That is so, is it not?

A. Well, we could not check every item. We were aware that he was put to considerable expense in Boston and rendered very important service, and in addition to that had to come to Philadelphia at least twice in order to testify here and give necessary information.

Q. Mr. Campbell was captain of the *Liscard?*

A. Yes, sir.

Q. Did you or not observe him rendering services in behalf of the vessel and cargo as master?

A. I know that he did render many services.

Q. Did you yourself pay him for those services, or did the Wrights pay him?

A. The Wrights paid him.

Q. From the services which were rendered by him in behalf of the general interests, and which I understand you to have said you were familiar with, what in your opinion would be a reasonable and proper charge, or are you able to say that the $180 which is charged in the adjustment is other than reasonable and proper?

(Objected to.)

THE COMMISSIONER: What you want to know from Mr. Johnson is, whether, from his observation in the case, he believes the captain spent $180 in services for the vessel and cargo.

A. I think it quite possible that he would spend that sum, considering all the circumstances and the fact that it took him nearly three months' work in Boston and Philadelphia to attend to it. That $180 would not be out of the way for three months' work.

By MR. LEWIS:

Q. You have been asked in reference to the services of John O'Brien for watching the wheat. I understood you to say that the lighters were moored near the ship?

A. Yes, sir.

Q. In your business you handle wheat, do you not, to a very considerable extent?

A. We do.

Q. Do you think it was a reasonable and proper precaution or not to engage a watchman to watch this wheat?

A. I think it was a necessary precaution.

Q. The insurances which were effected upon the grain after its discharge from the steamer I understood you to say were continued by you after you obtained possession of the cargo?

A. They were.

Q. From your knowledge of the rate of marine insurance, were the charges made in this case customary and usual or not?

A. They were proper and customary, and we got rates from several Companies in order to choose the lowest.

Q. In reference to the bill for cables and telegrams that you rendered, and which have been allowed in the adjustment, I understood you to say that one or two of the cables the adjusters rejected?

A. Yes, sir.

Q. Did they go over your cable book or not?

A. They went over every cable. They checked every word.

Q. To verify your bill?

A. Yes, sir.

Q. Did they examine the cables also, as to how they should be charged?

A. Yes, sir.

Q. Whether they were not cables in your own private business?

A. They read the cables. It was in some such way as that, some cable to the bankers in relation to the banking portion of it, that they did not think ought to go in that account, for a few dollars, they threw out.

Q. There is a charge of $79.50 which you have submitted to the adjusters, for telegrams, postage and charges for which you have no bill. Were or were not those charges obtained from the books at the office?

A. Yes, sir; they were made up from the books and cash items paid.

Q. How long has your firm been in business in the city of Philadelphia?

A. Since 1869.

Q. Do you object to stating the volume of your business last year, as to how it compares at any rate with other people in similar lines of business in Philadelphia?

A. I think that we ship more grain than any one else in Philadelphia.

Q. There is a charge made in the list of charges submitted to you by the adjusters of commission on disbursements. Was that or not a reasonable and proper and usual charge?

A. It was quite reasonable. We were informed by others that it was a customary thing.

Q. Was or was not the charge made for your services in reference to cargo, etc., as submitted to the adjusters, of $1,500, reasonable and proper?

(Objected to.)

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A. It was quite reasonable. We were informed by others that it was a customary thing.

Q. Was or was not the charge made for your services in reference to cargo, etc., as submitted to the adjusters, of $1,500, reasonable and proper?

A. It was.

Q. In reference to the charge made by you in this connection I understood you to say that that charge was for your services in looking after the interests of whom it might concern; is that so?

A. That is true.

Q. Did it or not include the services that you personally rendered to your principals?

A. Do you mean the charge that we made?

Q. I mean, the charge which has been allowed by the adjusters does not include services rendered to your principals in their individual capacity?

A. No. I consider our charge reasonable, excluding our principals in Portugal.

Q. In making any of the charges or incurring any of the expenses which you made or incurred in reference to this disaster, did you or not to any extent at all increase those charges or expenses by reason of the fact that there was insurance on the cargo?

A. No; we did not charge anything extra on account of the insurance.

RE-CROSS-EXAMINATION.

By MR. PARKIN:

×*Q*. You say your charges were reasonable, excluding the services you rendered your principals?

A. Yes, sir; excluding the services, as directly authorized to act for them.

×*Q*. Whom else did you represent besides your principals in Europe?

A. I think we represented the underwriters.

×*Q*. Were you employed by the underwriters to represent them?

A. Certainly not.

×*Q*. In this statement which you have made, Exhibits A and B of October 25th, is any allowance made for the deduction for the Peter Wright & Sons' bills?

A. It was not obtained at the time the statement was made up.

×*Q.* Do you know what expenses the captain was put to in Boston?

A. Living expenses there?

×*Q.* No; I mean expenses in the general interest?

A. I could not itemize them; no.

×*Q.* Do you know the character of them?

A. Yes, sir; he lived in a hotel there and he had to visit different offices in relation to the business and employ a carriage, and he had various telegraphic and other expenses and his living expenses.

×*Q.* His living expenses, his cab hire and his telegrams would about cover them all?

A. Yes, sir; and traveling to Philadelphia and back.

×*Q.* You said that you examined into the principal bills of Peter Wright & Sons, and thought they were reasonable?

A. Yes, sir.

×*Q.* I think you have already said you knew nothing about the underwriters' agent, about his services, page 147?

A. I think that is for the charge of the representative of Johnson & Higgins, sent to Boston first.

×*Q.* But you do not know about the reasonableness of that charge at all, do you?

A. No; I do not.

By Mr. Lewis:

×*Q.* That was their representative as insurance agents, not as adjusters, as I understand?

A. They sent on that man before they were appointed adjusters.

By Mr. Parkin:

×*Q.* You do not include that particular bill when you say you examined into the bills and found them reasonable?

A. Oh, no.

× *Q.* You said you inquired as the reasonableness of your charge of 2½ per cent. commission on disbursements, did you not?

A. Yes, sir.

× *Q.* You have not been in the habit of attending to such affairs as this, have you?

A. No; we fortunately do not have these affairs frequently.

× *Q.* So that your experience in that line is not very great?

A. No; but we looked over a number of adjustment books, and inquired of others in similar cases, and found that they often charged more.

By Mr. Lewis:

× *Q.* The charge that was made by Peter Wright & Sons for their services in connection with this matter, was that or not, in your opinion, reasonable and proper?

A. That was one of the reasons why we continued, at all events, to dispute the bills, and claim that some abatement ought to be made us, not that they did not well earn that commission, that I do not know anything about, I think they probably did; but we were bound to protect the interest of all concerned as far as possible, and obtain any abatement that we could.

By Mr. Parkin:

× *Q.* Over what period of time did their services extend? Do you remember.

A. Until the separation of cargo, when it was returned to us, which was from December, 1890, until March, 1891.

× *Q.* Their bill covered that period?

A. Their bill covered expenses during that time.

× *Q.* Their bill for services covered that period?

A. Yes, sir.

× *Q.* They in fact were the ones—?

A. Afterward treating with us to collect the money which was in dispute.

× *Q.* They, in fact, as representing the ship, attended to all these matters for all parties concerned?

A. Yes, sir; up to the time of the separation.

× *Q.* I think you said Mr. Young was on there?

A. Mr. Young, from Peter Wright & Sons, was in in Boston a very long time.

× *Q.* Was he there all of that time?

A. Nearly all the time, I think; yes, sir.

(Signature waived.)

Adjourned until November 29, 1893, at 11 a. m.

WEDNESDAY, November 29, 1893, 11 a. m.

Present.—EDWARD F. PUGH, ESQ., Commissioner.
MESSRS. LEWIS & TILTON, for plaintiff.
WILLIAM PARKIN, ESQ., for defendants.

BENJAMIN RUSH, having been duly sworn, was examined as follows:

By MR. LEWIS:

Q. You are associated with the firm of Johnson-Higgins, of Philadelphia?

A. I am.

Q. Do you remember the damage to the cargo of wheat on the steamer *Liscard*, when she put into Boston?

A. I do.

Q. Was the firm of Johnson-Higgins agent for any of the underwriters on the cargo of wheat?

A. Yes, sir.

Q. Look at the adjustment I hand you, and tell me what amount in money they had insured in the Companies that they represented?

A. I don't remember the exact amount we had insured. I think it covered lots No. 1 and No. 3.

Q. Do you remember what proportion of value you had, according to the adjustment covered by your Company?

A. I should say more than two-thirds.

Q. In that adjustment which you hold in your hand, there is upon page 147 an item of expenses, "Underwriter's agent, which has been apportioned between 2 special charges on cargo $233.33 and general average $466.67," the total entry being $700, and being composed of the expenses paid to and from Boston, and general services in Boston. Who rendered those services?

A. The special agent for the underwriters, Mr. William R. Coe.

Q. Where is Mr. Coe now?

A. I believe he is in Savannah, Georgia.

Q. Was he sent on by your firm as agent for the underwriters?

A. He was sent on as agent for the underwriters.

Q. Who was the local agent at Philadelphia for the London Assurance at that time?

A. The firm of Brockie & Welsh.

Q. Who are the local agents for The Manheim Insurance Company?

A. Barker & McCall.

Q. Did those firms know of Mr. Coe going to Boston in behalf of the interests they represented?

A. I think they were notified that he was going and I think they knew it.

Q. The services that were rendered by Johnson-Higgins in this matter, were they rendered in behalf of the Companies alone for which your firm were agent or generally in behalf of all interests?

(Objected to.)

A. Our firm generally rendered services to the vessel and the cargo, exclusive of any special interest in the insurances.

Q. How long has the firm of Johnson-Higgins been in business?

A. Over fifty years.

Q. How long have you been connected with the business of the character that they transact?

A. About nine years.

Q. From your knowledge and experience, is the charge made and are or are not the expenses incurred in this connection reasonable and proper?

A. Do you mean in amount or apportionment?

Q. In amount.

A. We saw no cause to object to them at the time.

By Mr. Tilton:

Q. And that was true, although your firm did represent certain of the underwriters having a large amount of insurance on this cargo?

A. Of course.

Q. And to that extent and in that capacity you were interested in seeing that the charges were proper charges? Is that true or not?

(Objected to.)

Q. Had your firm as agents for any of the underwriters on cargo an interest in seeing that no improper charges were made or allowed?

A. Had we seen any improper charges made we would have objected to them, undoubtedly.

Q. Does that apply generally to all the expenses incurred in relation to the cargo or not?

(Objected to. Question withdrawn.)

(It is admitted by Mr. Parkin that the book offered in evidence is an adjustment prepared by Messrs. Johnson-Higgins; that the bills are correctly transcribed and that the calculations are mathematically correct; that the supplies were actually purchased and the services were actually rendered: without admitting for whose benefit they were rendered or that the adjustment is a correct one.

(Mr. Tilton states, in offering proof of the adjustment, it is done without prejudice to their right to insist that the underwriters are bound by the adjustment as one under which they have made payment and settlement with the ship.)

By Mr. Lewis:

Q. In reference to this item of charge for underwriters' agent, the adjustment states that the services were rendered between December 26th and January 13th. Do you remember how long Mr. Coe was away from your office in Boston?

A. He was away, off and on, several weeks.

Q. During that time did he communicate with your firm by letter and telegram and so on?

A. Very regularly.

Q. From what you know of the services rendered by him, did they inure to the benefit and were they advantageous to all of the interests represented?

A. Yes, sir; I think they were.

Q. During all of the time that these services were rendered were you in communication with the agents of the ship and the agents of the cargo?

A. All that time.

Q. Was or was not Mr. Coe and your firm in this matter co-operating with the cargo's agent and the ship's agent so as to have the most desirable result obtained?

A. Yes, sir; they were.

Q. What is the experience of Mr. Coe in attending to matters of this character? How long was he with your firm?

A. His experience was a little less than my own in the matter, about eight or nine years.

Q. Was he sent away to attend to matters of this character and of other character similar to this?

A. He has been; yes, sir.

Q. Your firm has sent him abroad, have they not?

A. Several times.

Q. During the time that these services were rendered by Mr. Coe to your firm, was he reporting to your firm and advising with you?

A. He used to write us and wire us on the average once a day.

(The examination in reference to the charge of underwriters' agent being concluded, counsel for plaintiff call upon counsel for respondents to indicate whether there is objection to any special item in the adjustment or special items thereof.)

(Counsel for respondents declines to answer the above call.)

By Mr. Lewis:

Q. You went over all of the original bills connected with this accident, did you not?

A. I did.

Q. You personally and individually did.

A. Yes, sir.

Q. From those original documents and bills you made up this adjustment?

A. I made up a rough adjustment first, of which that is a copy.

By Mr. Tilton:

Q. How long was your office engaged making up this adjustment, about?

A. About five or six months?

Q. Who participated in the work?

A. Mr. William K. Shope, Mr. John H. Gourlie and myself, and besides, of course, the copying clerks.

Q. Where is Mr. Gourlie?

A. He is at present in New York City.

Q. Tell the Commissioner whether Mr. Gourlie is the author of a treatise on General Average?

A. Yes, sir. He has written a standard work on General Average, which is used in this country.

Q. Do you know to what extent it is used?

A. I know it is used by all average adjusters.

Q. What was Mr. Gourlie's part in this work?

A. He was, you might say, consulting adviser. Whenever any point came up which we were not certain about in Philadelphia, we submitted it to him.

Q. After the work was completed, what did Mr. Gourlie have to do with it—after the rough adjustment was made out?

A. Before the apportionment was finally settled I went on to New York, and went over the entire case with Mr. Gourlie, and discussed various items as to which we were in doubt, and the adjustment you now have is the result of that discussion.

Q. In the first instance, and before the matter was finally submitted to Mr. Gourlie, by whom were the apportionments of these various charges made?

A. The bulk of the adjusting work was done by Mr. Shope and myself.

Q. Were those matters subsequently gone over with Mr. Gourlie?

A. They were.

Q. State whether or not the rough draft which was submitted to Mr. Gourlie contained the apportionments of these charges at the time he examined it?

A. The apportionment had probably been blanked out, but the figures not actually filled in.

Q. When was the latter done?

A. After consultation with him.

By Mr. Lewis:

Q. How many adjustments have your firm made out, do you think, during their fifty years' career?

A. I really could not say.

Q. What relative status have they in the ports of Philadelphia and New York as average adjusters?

A. They are, I believe, a very capable firm. They have a very large practice.

Q. Where have they offices?

A. New York, Philadelphia, Boston, Baltimore, San Francisco, besides several agencies.

By Mr. Tilton:

Q. State whether or not this is a correct adjustment of all the charges contained in it?

(Objected to. Objection overruled.)

A. I believe it to be so.

Q. In making up this adjustment, state in a general way what papers you had before you?

A. We had the protest, all surveys, various drafts of agreements, and a final agreement by bills in regard to the case, invoices, bills of lading, copy of the charter party, valuations, certificate of vessel and numerous memoranda taken by ourselves from various people in interest.

Q. And the original bills?

A. Yes, sir.

Q. You had, I infer from your answer, not only all the papers contained in this adjustment, but other documents?

A. Quite a number.

Cross-Examination.

By Mr. Parkin:

×*Q.* Your firm did not represent The London Assurance Association as insurance agents, did they, generally?

A. Not generally; no.

×*Q.* Nor The Manheim Company, either?

A. Not generally.

×*Q.* Do you not know, as a matter of fact, that Mr. Coe did not represent those Companies when he went to Boston?

A. No; I do not.

×*Q.* Do you not know that The London Assurance Company expressly refused to allow Mr. Coe to represen them?

A. I have no personal recollection of it.

×*Q.* You do not know of any appointment by him by either The Manheim or The London Assurance?

A. No, sir.

×*Q.* Do you know whether Mr. Coe has ever had experience in attending to a cargo of damaged wheat before this?

A. No, sir; he has not had any special experience in regard to wheat.

×*Q.* What was your work in making up the adjustment?

A. The work of Adjuster—deciding on the various divisions, the various items, and making up the statement.

×*Q.* I think you said you were in doubt as to certain matters?

A. We were.

×*Q.* You consulted Mr. Gourlie in regard to those?

A. Yes, sir.

×*Q.* Can you point out what items you were doubtful about?

A. It was so long ago that I cannot point them out all. They would be generally in regard to division of certain charges of agents for cargo between special charges and owners of cargo, and an occasional division between general average and special charges. I could not state the cases definitely. Some questions about commission, too, I recollect.

×*Q.* Was there any question in your mind as to the commission for collecting the special charges, or the general average charges?

A. No, sir. That is a universal charge in all American vessels.

×*Q.* As to collecting special charges also?

A. All the ones I have ever seen.

×*Q.* What are the commissions, in regard to which, there was a doubt in your mind?

A. It was one of the commissions for advancing. I don't recollect which one.

×*Q.* Was it the commission for placing agents in funds, charged on pages 179 and 180?

A. I couldn't really say which one it was, at this lapse of time.

×*Q.* Can you tell, by looking at the adjustment now, as to what the items were, concerning which you were doubtful?

A. No, sir; I could not say. I know our statement was the upshot of what our best judgment was in the matter.

×*Q.* Do you remember according to what rules this adjustment was made?

A. The agreement would provide for that. As near as I can recollect it, it was American law.

×*Q.* What agreement do you refer to?

A. Agreement to break up the voyage.

×*Q.* If there was nothing stated in that agreement, according to what law would you make up the adjustment?

A. The agreement was to break up the voyage at Boston, was it not?

×*Q.* Yes?

A. The separation of interest taking place there, we would naturally apply American law.

×*Q.* According to Boston rules?

A. According to Boston rules.

×*Q.* According to the American law, from what date are the provisions and wages chargeable on general average?

A. It depends a good deal on the facts of the case. Generally from the time of bearing away until the voyage is resumed.

×*Q.* How did you treat it in this case?

A. From the date the vessel arrived at Boston until the voyage was terminated.

×*Q.* On what ground did you do that?

A. The separation of interest made at the end of the voyage.

×*Q.* You say you charged for provisions and wages from the date when the vessel arrived at Boston?

A. Yes, sir.

×*Q.* But you say that the American rule is from the date when the vessel bears away from the point of refuge?

A. Yes, sir; generally.

×*Q.* You have not, then, in this case, charged the wages and provisions in accordance with the American rule?

A. I cannot, at the moment, state our exact reason for doing that. I know we had a reason or we would not have done it.

×*Q.* Is not that charge which is made on page 179 made in accordance with the York-Antwerp rules?

A. I cannot say definitely in this special case. The York-Antwerp rules provide from the date of arrival at port, as is shown here.

×*Q.* In regard to the contributory value of freight, what is the American rule in regard to that, or the rule in Boston in regard to that?

A. The rule of Massachusetts is deduction of one-third.

×*Q.* What are the York-Antwerp rules in regard to that?

A. They are the expenses that would have been saved had the vessel at the time of the sacrifice been a total loss. I mean expenses applying to freight.

×*Q.* Look at this book, being McArthur on Insurance, and see if Rule 17, of the York-Antwerp Rules, is in accordance with the statement which you have just made?

A. Yes, sir; that is a correct statement of the York-Antwerp rules

×*Q.* Is that in accordance with the statement you have just made?

A. Yes, sir.

×*Q.* You have not adjusted the contributory value of the freight in accordance with that rule, have you?

A. Apparently not; no. As a third is deducted.

×*Q.* In this adjustment you have charged part of the expenses of discharging the cargo to general average, and part to special charges on the cargo, I believe?

A. Yes, sir.

×*Q.* Can you tell me how you arrived at the division?

A. My recollection is that a portion of the cargo had to be discharged to be reconditioned, and a portion had to be discharged to repair the ship. The division of costs of discharge would probably be made on the quantity discharged for each purpose.

×*Q.* Can you now remember how much had to be discharged for the purpose of repairing the ship?

A. No, sir; I think the adjustment shows that.

×*Q.* Do you know from what source you got your information as to that?

A. I cannot say definitely. We would probably get it from the ship's agent and from the surveyors.

×*Q.* There is an item on page 59 of an amount charged to special charges for cutting rail stay. Do you know why that was charged?

A. That would be charged on the same basis, that the stay was cut to discharge cargo to be re-conditioned for its own benefit.

×*Q.* Do you know what that stay was?

A. No; I do not recollect.

×*Q.* Do you know why that sacrifice should have been made for the special benefit of the cargo?

A. Not at this date, except in the answer I have given.

×*Q.* Because you see it was charged there you suppose it was charged for that reason?

A. Yes, sir.

By Mr. Tilton:

×*Q.* Would an apportionment of part of that charge against cargo be based upon information that you received

at the time that the stay was used for the cargo's purposes?

A. Yes, sir.

By Mr. Parkin:

×*Q.* There are certain charges there for marine insurance, pages 131 and 132. Some of them are charged to general average and some to special charges on cargo. Can you tell me on what basis that apportionment was made?

A. Not definitely. A part of it would be on that same basis, the cargo was discharged for its own preservation, but whether it was all charged on that basis or whether for some ulterior reason, I cannot recollect at present. The special charge seems a little charge in proportion to that charge of general average, so I think there must have been some reason besides that to make the charge.

×*Q.* On what ground would you charge marine insurance at all in the adjustment?

A. It is a universal custom when a vessel puts into a port of refuge and cargo is discharged for it to be insured, and that charge is always included either in general average or special charges, as circumstances may require.

×*Q.* Do you not understand that the policy protects the cargo after it has been discharged for its own benefit?

A. It does.

×*Q.* You understand I refer to the original policy?

A. Yes, sir.

×*Q.* Turn to item on page 185, commissions collecting, general average and special charges. To whom is that commission payable?

A. Whoever does the collecting.

×*Q.* In regard to the wages and provisions which are charged in general average, is it not the universal custom, according to the American law, to charge them from the time of bearing away?

A. It depends a great deal on the circumstances of the case. A vessel may be in port and not start. The charge is from the time the voyage is interrupted. It might not have been bearing away at all.

×*Q.* Where a vessel is not in in port, but is on her voyage, and has to bear away to a port of refuge?

A. If she bears away out of her course it is allowed from the time she bears away. Of course, if the port of refuge is in the direction she is going to, anyhow, they don't allow it until the delay commences.

×*Q.* If she has to bear away you allow that time?

A. Yes, sir.

×*Q.* That is the rule laid down by Mr. Gourlie, is it not?

A. Yes, sir.

×*Q.* How is it that, in regard to contributory value of the freight, you have made your adjustment according to the American rule, but in the charges for wages and provisions you have charged it according to the York-Antwerp rule?

A. At this date I cannot explain it. There must have been a reason. Probably found in the agreement. Mr. Gourlie and myself had some question on the contributory value of freight, and what we put there was the result we arrived at.

×*Q.* There are some charges on pages 169 and 170 for cables and telegrams. Can you tell me how how you arrived at that apportionment between cargo special charges and general average?

A. We got an account of various cables and telegrams showing what each cable and telegram was for, and in accordance with the tenor of that cable, whether it was for the benefit of general charge or cargo specially or ship owner specially, we charged up accordingly.

RE-DIRECT EXAMINATION.

By MR. TILTON:

Q. With respect to the apportionment of the item of freight, will you look at the agreement already offered in evidence and signed by The London Assurance Company and The Manheim Insurance Company, and state whether the clause contained in it is as follows: "In any claim, excepting for general average, that may be established by the shipper or owner of the cargo against the insurers, the said sum of $3,600 shall be a recoverable item," and state whether that may have influenced you in the disposition you made of that item?

A. Yes, sir; it would indirectly. As I recollect it now, it was a question whether the thing should contribute any value, or have a reduction made from it.

Q. You have been cross-examined about certain items, which, in consequence of some doubt in your mind as to the disposition to be made of them, you consulted with Mr. Gourlie. Tell us whether, in making out every important adjustment, that thing occurs?

A. We always think that two heads are better than one. Whenever we have an important case we get either Mr. Gourlie or Mr. Krebbs, or some man to talk it over.

Q. Is it, or not, the common practice of adjusters in making apportionments of items which requires some explanation, further than appears on the face of the bill, to obtain such information from the parties interested and to make the apportionment in accordance with that information? Is that part of the duty of the adjuster?

A. You always have to have outside information on the bills to correctly make up the average. Bills never give you the information you want.

Q. Without such information, would it be possible to correctly state the adjustment?

A. It would be possible perhaps, but extremely difficult.

By MR. PARKIN:

Q. How would that agreement which you have been shown, in regard to the freight, have affected your adjustment as to the contributory value of the freight?

A. I think we took the value at the time that that item could be considered, not only as freight but as a sum paid to break up the voyage by the cargo to the ship, and thinking that we wanted to satisfy ourselves whether it would be proper whether it should contribute any value, but we finally came to the conclusion that it would be more correct to call it freight, $3,600, and make customary deduction from it, rather than to treat it as a bonus.

Q. You treated it as freight, did you?

A. Yes, sir.

Q. Treating it as freight you made the reduction according to the American rules, did you?

A. Yes, sir.

By MR. TILTON:

Q. If, as appears to be the case, charges for wages and provisions have been taken from the arrival of the vessel in Boston rather than from the time of her bearing away, would that be to the advantage of these underwriters or not? Would it or not be a less sum charged?

A. The less wages and provisions you have either in general average or special charges the less general average the cargoes have to pay.

By MR. PARKIN:

Q. As to the contributory value of freight, how would that affect the underwriters in this case, whether you deducted one-third or deducted merely the wages from the time of bearing away until the arrival in port?

A. I would have to estimate what those wages would be on the voyage up. I think they would be about the same. Probably they would be a little more. That I don't know without estimating.

By THE COMMISSIONER:

Q. Johnson-Higgins were the average adjusters in this case?

A. Yes, sir.

Q. They also represented certain interests which were independent of their action as average adjusters?

A. Yes, sir.

Q. What were those interests?

A. First and foremost with the average adjusters they were the agents for certain other agents of cargo.

Q. What ones?

A. I recollect The Western Insurance Company and The International Marine. We were the brokers of the shippers of cargo. We placed the cost on it and we also were consulting agents for the agents and owners of the vessel.

Q. I understand you that you placed all of the insurance including that of The London Assurance and The Manheim Company originally?

A. I think we did, because you recollect Mr. Brockie said that he consulted with us instead of direct. That is what we would do if we were so brought in the case.

By MR. LEWIS:

Q. So that in placing the insurance your firm acted as agents for these two Companies that are here before the Commissioner?

A. They acted as the agents for the assured.

At one o'clock, recess until 1.45.

P. F. YOUNG, having been duly sworn, was examined as follows:

By MR. LEWIS:

Q. You are associated with the firm of Peter Wright & Sons, of Philadelphia?

A. Yes, sir.

Q. Please look at the ninety-two bills that I hand you, marked "Exhibits No. 1 to No. 92, inclusive, E. F. P., Commissioner," and tell me whether your firm incurred the expenses, and rendered the services referred to in these bills, in connection with the accident to the steamer *Liscard?*

A. Yes, sir.

Q. Did your firm pay those bills?

A. We paid those bills.

CROSS-EXAMINATION.

By MR. PARKIN:

×*Q.* You went on yourself to Boston, did you not, in regard to this *Liscard* matter?

A. Yes, sir.

×*Q.* You took complete charge of matters there?

A. Yes, sir.

×*Q.* You arranged for the discharge of the cargo?

A. Yes, sir.

×*Q.* And warehousing of it?

A. Yes, sir.

×*Q.* And the re-conditioning of it?

A. Yes, sir.

×*Q.* You acted as agent for the ship, and all concerned in the matter, did you not?

A. Yes, sir.

×*Q.* The voyage was broken up in the latter part of February, or in the early part of March, I believe?

A. Yes, sir.

×*Q.* You, as representing the vessel, I believe, protested against the abandonment of the voyage?

(Objected to, as something which only occurred in the preliminary stages of the matter, which was consummated finally by an agreement to break up. Question withdrawn.)

R. WINDER JOHNSON, re-called for further cross-examination.

By MR. PARKIN.

×*Q.* State whether your charge was made upon a per diem basis?

A. No, sir; it was not.

×*Q.* You arrived at it merely as a lump sum?

A. As a lump sum.

×*Q.* I understand that the services which you rendered in that regard were first attending to the discharge and reconditioning of the cargo?

A. Yes, sir.

×*Q.* Secondly, the sale of the cargo?

A. Yes, sir.

×*Q.* And thirdly, the settlement of the general average claim with Peter Wright & Sons?

A. Yes, sir; those are, I guess, the main points. All the details came under those, such as attending to re-insurance, etc.

×*Q.* I want to get it a little more in detail than you have given in your former examination what you did under each one of these particular heads. I mean first in regard to reconditioning and discharging of the cargo. Please specify, as far as you can, how many days you were in Boston attending to that, and what you did in Philadelphia?

A. First of all, when we heard of the accident and the steamer putting into Boston, we immediately consulted with Johnson-Higgins as representing the underwriters, and also with Peter Wright & Sons, as representing the ship. It was by our suggestion and consent that Johnson-Higgins immediately sent someone on to Boston to consult with the captain and to see what was necessary. We received direct communication from this man that Rush spoke of this morning, as well as copies he even sent us of his letter to Johnson-Higgins; so that we were daily in

communication first through him. At that time, not yet having broken up the voyage and turning the cargo over to us; in fact, the steamer was not yet discharged, and the extent of the damage was not known, Peter Wright & Sons, as representing the ship, sent also their man to Boston. We then also chose a grain inspector in New York as soon as the cargo began to discharge, and had him on the deck of the ship, remaining in Boston until every bushel of it was out.

×*Q.* That was the representative of Annan & Co., Mr. Greensford?

A. Yes, sir; I remember him.

×*Q.* His charge for services is separately stated in this account?

A. Yes, sir; bill rendered to us and paid by us. We chose him as an expert in grain. Then the various items of agreement, expenses of discharging were brought to our attention from time to time by Peter Wright & Sons, all of which were checked. Finally, about the time the discharge was finished, I went personally to Boston. In the meantime Mr. Greensford had been in Philadelphia twice to report to us, and had been sent back to Boston. Then I went on myself after the cargo was discharged, saw it in the elevator, saw that in the barges, treated with the Insurance Companies there about insurance, with the Boston Towboat Company about their conditions and charges for discharge terms and lighterage and storing grain in lighters.

×*Q.* You did not make the contracts?

A. We had not made the original contract; no.

×*Q.* Peter Wright & Sons made those contracts?

A. Peter Wright & Sons, with the captain and with the knowledge of the representative of Johnson-Higgins who also at that time was representing us, did know of it originally. I went through an elevator and saw the grain and saved some screenings and sweepings that had been put aside, and dealt with two or three exporters in Boston to get their best bids. I did this personally.

×*Q.* I want the items under the different heads which I have mentioned?

A. I am giving you a succint account from the time the vessel put into Boston and what we did with relation to the cargo.

×*Q.* I want to know, first, as to what you did merely in relation to the discharge and re-conditioning of the cargo?

A. That I have about covered up to the time the cargo was discharged.

×*Q.* That is up to the time the voyage was broken up?

A. No, sir; that came later still.

×*Q.* State what you did with regard to re-conditioning up to the time the voyage was broken up?

A. We had our inspector, who daily reported to us and sent us samples and advised the putting in the elevator, the separation of grain and re-conditioning.

×*Q.* After the voyage was broken up, I think you said that the grain, some of it, was again put through the elevator?

A. Some of it was turned in the elevator, re-handled, as they call it, and some of it was transferred from the lighters in which we received it into another lighter to go to New York.

×*Q.* Did you make any special agreement with regard to that re-handling after the voyage was broken up, or was that done by the elevator people as part of their general business?

A. The prices are fixed prices, the same as they are in Philadelphia.

×*Q.* I do not refer to prices, but as to whether there was any new agreement made, or did they go on and do that under the original agreement?

A. They did it under the same conditions as originally agreed, but under our directions.

×*Q.* Under new directions?

A. Under new directions.

×*Q.* You have now specified all that you did up to the time the voyage was broken up?

A. I would not like to say I had.

×*Q.* In regard to the re-conditioning?

A. I would not generally say so. No. There are so many details and items, I do not suppose I could recall them in a month.

×*Q.* Can you give me an estimate of how many days' work were devoted to that part of your service?

A. That would be very difficult. Certainly the work has occupied what would be equivalent to months of any one person's time.

×*Q.* In regard to the sales. What did you do in regard to the selling of the cargo?

A. We did everything that was done.

×*Q.* You put it into the hands of brokers.

A. Yes, sir. We put it in the hands of brokers to bring us the best bids they could. We also corresponded direct and endeavored to get direct bids, as well as visited buyers. We had offers from reputable firms to receive certain lighters as a gift, absolutely refusing to pay a quarter of a cent a bushel for the grain all the way up to the final price at which we sold it. I cite that to show the labor and attention we gave to it.

×*Q.* The sales were completed some time in March, I believe, as the statement shows?

A. Yes, sir. I have given you an exact statement of the dates, which, I think, shows the 12th as the last date.

×*Q.* Did you have any difficulty in collecting any of the money?

A. No. We were very nervous and anxious about it and had to inquire as to the standing of some of the concerns. In one or two instances when we made the sale we got some payments in cash on account, and then we were assured as to the standing of the buyer.

×*Q.* After the voyage was broken up, what other

labor did you perform for which you have charged these $1,500.

A. We contested and delayed these settlements with the ship for about eighteen months, I think, from March, 1891, to October, 1892, about eighteen months, constantly had this matter under advisement and attention and attempted to make several settlements before we arrived at the final one in the end of October.

×*Q.* Can you tell me how much time was devoted to that?

A. It would be quite impossible for me to say now.

×*Q.* How did the amount of that labor compare with the amount of labor given to the re-conditioning of the cargo?

A. The greatest portion of the time was given up to the date of selling the grain. After that the time devoted to it and the number of meetings were fewer. Before that it was a question of daily attention. From December, 1890, to the middle of April, 1891, it was a business which took hours every day, Sundays sometimes included.

×*Q.* After that voyage was broken up, and you had received the cargo, was much time devoted to the making of the sales of the cargo?

A. That was done just as quickly and promptly as possible, but a great deal of time was given to it; yes, sir.

×*Q.* Your business is that of buying and selling grain on commission, is it not?

A. Yes, sir; that is a portion of our business.

×*Q.* In selling grain do you guarantee the sales?

A. What do you mean by "guarantee"?

×*Q.* Guarantee the accounts to your customers?

A. Yes, sir.

×*Q.* When you sell on behalf of a principal, do you guarantee the payment?

A. We do.

×*Q.* What is the usual commission charged in such a case?

A. That is a question which has been cut and reduced of late years very much. It goes all the way from one cent a bushel to recently a half a cent. Any one who receives grain from the West to sell here does the financial part of it, guaranteeing payments, and a few years ago he never charged less than a cent a bushel, but at present that rate is cut.

×*Q.* The commission charged, then, is so much a bushel, is it?

A. Yes, sir.

×*Q.* And not such a per cent. of the price?

A. No, sir. A broker gets usually a percentage. But the merchant, guaranteeing, gets a certain sum per bushel, whether corn or wheat.

×*Q.* Has this bill of $1,500, which you have rendered, been paid as yet by your principals? I mean by the libellants in this case?

A. Yes, sir.

×*Q.* It has been paid?

A. Yes, sir; that is, it has been deducted by us from the remittances we have made.

×*Q.* And assented to by them?

A. Yes, sir. They have not raised one question about it.

×*Q.* I think you said that the cables for which a charge has been made in the adjustment were some of them sent to Lisbon, communicating with the owners of the wheat, others to London, communicating with bankers, and others to Liverpool?

A. One Insurance Company is domiciled in Liverpool. Lisbon and England were the points.

×*Q.* Some of these cables, I think you said, were sent to The London Assurance Company?

A. Yes, sir; I think so. I know we cabled to some of the Insurance Companies, and I think The London Assurance is one.

×*Q.* Were those charged in the adjustment?

A. That I can't tell you. We showed all those cables, according to the statement made there, to the adjusters; they read them over, the cables and their translations. Some few to the extent of a few dollars, three to five dollars, they threw out as not properly in their opinion belonging to the adjustment, but were due entirely to our relationship with the wheat owners in Lisbon for their interest alone. On that account they threw them out, I believe. Every cable that has been put into the adjustment was checked and read by the adjusters. I brought those books here a week ago and submitted them to you.

× *Q.* Can you tell from this exhibit, tissue press copy of cables sent and received by your firm, what cables were sent in regard to the banking part of the business?

A. I cannot state from the paper in your hand which cables were sent, in relation to the banking, to London. But I know that we did cable to two different banking houses in London, who held the documents in this case, to arrange all the details, gathering the insurance certificates, bills of lading, and did treat with their principals in Lisbon in any way which was necessary to obtain these documents and send them to us at once.

× *Q.* Was that the only subject upon which you cabled to London?

A. No. We had to get instructions from the bankers what we were to do with the money, the results of proceeds of this cargo, whether they released their claim against the cargo, and we also cabled to the owners or agents of the steamship in the beginning, asking them to appoint Johnson-Higgins as Adjusters. That was another cable in England.

× *Q.* Can you give me approximately what was the cost of the cables upon the subject you have last mentioned, as to the appointment of Johnson-Higgins?

A. One cable.

× *Q.* Can you give me, approximately, the cost of the cables to the bankers, in regard to furnishing the funds?

A. I cannot, but they were much less than the cables to Lisbon direct. The bankers did not furnish the funds. You mean in reference to their lien? You recollect from my former statement, that some cables to London regarding documents were made necessary from the fact that we first received one to the effect that the parties in interest refused to make any settlement until all the copies of the bill of lading were produced, requiring some additional cabling.

× *Q.* These cables in regard to bills of lading were sent after the agreement to break up the voyage?

A. No; they were all sent before, in consequence of treaties going on.

× *Q.* Are you certain with reference to that?

A. Altogether.

× *Q.* I asked you the other day about the fee paid your attorney. Can you tell me what services were rendered by your attorney for that fee besides the arranging of the contract to break up the voyage?

A. I cannot very well testify as to the exact charges of our attorneys. I think you had better put them on the stand to do that. We thought it was a reasonable charge at the time, and, dealing with reasonable people, we do not like to question bills. It was partly through their instrumentality that voyage was broken up and the cargo secured for you. The attorneys made the final agreement in Boston whereby the cargo was secured for the underwriters and the voyage broken up.

× *Q.* These charges are for the negotiating of that?

A. That charge, my recollection is, was especially for that trip to Boston and the details and work connected with that contract.

× *Q.* They negotiated that agreement in Boston?

A. They negotiated that agreement in Boston in connection with two other attorneys representing distinct interests.

×*Q.* Is much wheat exported from this country to Lisbon?

A. We have sent over 1,000,000 bushels since July 1st, this year, already.

×*Q.* Is it exported there for sale in the market or for use at the mills?

A. It is ground into flour in Portugal.

×*Q.* Is there any market in Lisbon for foreign wheat? Generally is not nearly all wheat that is exported to Lisbon exported for the purpose of being made into flour by the consignees?

A. Yes, sir.

×*Q.* Not merely for the purpose of being sold there by them?

A. Most of it is bought by the mills direct.

×*Q.* It is not re-sold as wheat?

A. No. The laws in Portugal are very extraordinary. It appears they fix a certain number of pounds for each miller in the country of foreign wheat, and he can only mill to that pound. He cannot even enter it in the Custom House beyond that quantity.

RE-DIRECT EXAMINATION.

By MR. TILTON:

Q. Please state whether any efforts were made by you to sell the very badly damaged wheat in Boston, and what was the result?

A. We tried most of the exporters in Boston, and for the worst lighter my recollection now is that they agreed to accept it along with another lot, but without any price, it being fit only for manure, in their opinion. A portion of it they proposed dumping on the flats near Boston somewhere. We then had samples drawn, exposed on the Exchange in New York through our broker there, and finally made the sale to New York parties of that badly damaged stuff.

Q. Were your efforts to find sales for that lot of wheat in Boston thoroughly made?

A. The Boston grain market is a very small one, and I think the ground was entirely covered there. In fact, no exporter of grain in Boston did not know of the circumstances connected with the *Liscard* wheat.

Q. Your firm did that?

A. We did that ourselves. I think there was no one of the grain exporters in Boston who did not know all the circumstances of the *Liscard* wheat.

Q. State whether, for the insurances upon wheat in the lighters, the risks were tendered to any of these underwriters?

A. I think they were. I am not so clear on that when lying in the harbor in Boston, as I am regarding the transfer in sloops around to New York. There I distinctly recollect offering it some of the underwriters interested in the cargo, and they refused to take the risk.

Q. Describe how it was brought from Boston to New York?

A. A portion of it was transferred from very small boats, like canal boats, into a little sloop by a floating elevator and was then towed around to New York.

Q. Was that done by yourself?

A. That was all arranged by ourselves.

Q. State whether the various surveys made upon this wheat from time to time were examined by you?

A. They were.

Q. What as to your communication with Messrs. Wright & Sons during the period immediately following and pending the discharge of the cargo?

A. It was most frequent and lively.

By Mr. Parkin:

Q. What was the premium paid for insuring the cargo which was brought around to New York?

A. I don't recollect.

Q. Does that appear in the documents here so it can be separated?

A. I fancy it does.

By Mr. Tilton:

Q. Can you state whether the agreement to terminate the voyage to which these underwriters consented was consummated with little effort on the part of your attorneys or whether it was the subject of long negotiations?

A. Very long negotiation.

By Mr. Parkin:

Q. Is the item of $4.66, marine insurance, on page 48, and the item of $30.20, marine insurance, on page 50, of the adjustment, the marine insurance on the cargo which was brought to New York?

A. No; I think those charges covered all the marine insurance on these particular sales. You pointed out set No. 3. That is the only item of marine insurance I notice charged to that set. Under set No. 2, in which you are not interested, is another item of marine insurance. It is divided according to the portion of grain and its value.

Q. It does not appear what the premium was for insuring the cargo that was brought to New York from Boston?

A. Apparently not on that. There are several restatements of the sale of grain here, recapitulations, transferring and elevator, etc.

Q. Were the *Delia Carlton* and Lighter No. 4 the barges which went to New York?

A. Yes, sir.

By Mr. Lewis:

Q. They had part of this wheat in, as I understand, of lots No. 1 and No. 3?

A. It was a portion of the wheat which belonged to Bills of Lading 1 and 3.

(Witness produced papers called for by Mr. Parkin at the last meeting, marked "Exhibits 200 and 201.")

By Mr. Parkin:

Q. Did you meet Mr. Amarig in Boston?

A. In what capacity? I do not recollect the name just now.

Q. The secretary of the National Board?

A. I couldn't tell you the name of one of the insurance people I did meet. I was in two or three insurance companies' offices there and met quite a number of gentlemen, but I don't know the name of one of them.

Q. Do you remember one of those gentlemen protesting against the voyage being broken up?

A. I remember there was one gentleman who did not make his position in the affair at all clear to me, who seemed to be very anxious to know all I was doing, and who came to the hotel to inquire several times. That must have been the man you mean. What his name is I don't know. I was a little afraid of him from the way he behaved.

Q. Do you remember this gentleman protesting on behalf of any of the Insurance Companies against the voyage being abandoned?

A. He did not protest against the voyage being abandoned; no. But he protested against everything that was done. That was my general recollection of this man that followed me around. He did not seem to like anything. This man that followed me evidently knew personally very little of what was being done, and although he was on the spot and professed to have been used to elevators, I found he really knew nothing at all.

By Mr. Tilton:

Q. Did you ever know until to-day when you heard Mr. Brockie's testimony that The London Assurance had ever withdrawn their consent to have Mr. Coe act in Boston?

A. No; I never heard that before.

By Mr. Parkin:

Q. Did you ever know he had the consent of The London Assurance?

A. I understood he was acting for all concerned.

Q. But you did not know?

A. I don't recollect any definite information being given to me, more than a document was got up and signed, which I thought covered everything.

By Mr. Lewis:

Q. By all the various underwriters' agents at Philadelphia?

A. Yes, sir. I know that such a paper had been signed.

Q. You never knew that Mr. Brockie had withdrawn?

A. No, sir.

William Brockie, having been duly sworn as a witness for respondents, was examined as follows:

By Mr. Parkin:

Q. Are you a member of the firm of Brockie & Welsh?

A. Yes, sir.

Q. You are the agents of The London Assurance Company in Philadelphia?

A. Yes, sir.

Q. You were such agents in 1890?

A. We were.

Q. Do you remember calling at the office of Johnson-Higgins about the 29th of December, 1890, in regard to the appointment of Mr. Coe as representing The London Assurance in Boston in regard to the *Liscard?*

A. I do.

Q. Whom did you see on that occasion?

A. My recollection is I saw both Mr. Shope and Mr. Curtin.

Q. Tell me what you said to them?

A. I told them that we would have to withdraw our authority from agreeing to Mr. Coe as our agent.

Q. That is as agent of The London Assurance?

A. Yes, sir.

Q. And informed them you would not consent to Mr. Coe representing The London Assurance?

A. I did.

CROSS-EXAMINATION.

By MR. TILTON:

×*Q.* What had occurred in the first instance about Mr. Coe's going on to Boston to represent all interests in the matter?

A. We were asked to sign a letter which the other underwriters had signed, agreeing to his representing the underwriters' interests in the cargo. We did so and advised Mr. Despard in New York, and telling him in that letter that if he had any one else that wished to act independently that we would so advise Johnson-Higgins. Mr. Despard telegraphed us that he had, and we immediately withdrew from the agreement.

×*Q.* You understood at that time Mr. Coe was in Boston, did you?

A. I didn't know whether he was or not.

×*Q.* Your withdrawal from that agreement was partially in consequence of the stand you took at that time that your underwriters were not liable at all for any damage to this cargo?

A. The reason was given that we had a special agent in Boston—a special correspondent.

×*Q.* Who was he? What was his name?

A. I don't know his name. I think he was the agent of the National Board.

×*Q.* Did he make any report to your office?

A. He did not. When I said "We," I meant The London Assurance.

×*Q.* The Philadelphia office of The London Assurance had nothing to do with sending him there and you do not know what he did while there?

A. No, sir.

×*Q.* You remember, as matter of fact, that at about that time you took the position that there was liability on the part of your Company under their policy on this cargo, do you not?

A. Yes, sir; I do.

By Mr. Lewis:

×*Q.* As I understand it, you had previously to that joined in the appointment of Mr. Coe to make the examination?

A. Yes, sir.

×*Q.* And you think at that time, about on the 29th of December, you called at Johnson-Higgins' office, and saw somebody that was probably Mr. Johnson, or Mr. Shope, or Mr. Curtin?

A. Mr. Curtin. We telegraphed to Mr. Despard that we had canceled Johnson-Higgins' authority to act for The London Assurance on that date.

×*Q.* Do you remember what they said to you?

A. No. Except that I remember it was satisfactory.

By Mr. Tilton:

×*Q.* You did not notify Messrs. Lawrence, Johnson & Co. that your Company had withdrawn from the consent to have Mr. Coe act?

A. No, sir.

By Mr. Lewis:

×*Q.* And never have notified them at all?

A. Never have notified them.

×*Q.* You did not notify Peter Wright & Sons either, did you?

A. I can't say as to that. I don't remember having done so.

By Mr. Parkin:

×*Q.* When you signed that paper, was it with any proviso, at the time? Do you remember?

A. I can't remember distinctly that there was, except from the tone and wording of my letter, I think there must have been.

×*Q.* What sort of a proviso was that?

A. That, if Mr. Despard did not approve of that appointment, it would be withdrawn.

×*Q.* And that appointment was an appointment for Johnson-Higgins to act as representative of The London Assurance?

A. Yes, sir.

×*Q.* How long after that was signed was it that you called at their office and withdrew that?

A. It was signed on the 26th, which was Friday, I think, and it was withdrawn on the 29th, Monday.

×*Q.* You have no communication with Lawrence Johnson & Co., about that?

A. No, sir; none whatever.

×*Q.* Either before or after that?

A. At no time.

By Mr. Lewis:

×*Q.* You knew their connection with Lawrence Johnson & Co., and the interests involved?

A. They were our assured in the matter.

Joseph Hadley, having been duly sworn on behalf of respondents, was examined as follows:

By Mr. Parkin:

Q. What is your business?

A. Marine insurance.

Q. What Company are you connected with?

A. London Assurance.

Q. How long have you been in the business?

A. Since 1876.

Q. How long have you been with The London Assurance Company?

A. Since 1889.

Q. Are you a member of any of the committees of the National Board of Marine Underwriters?

A. Yes, sir. I am a member of the Adjustment and Arbitration Committee, and I am also a member of the Inspection Committee.

Q. It appears by the evidence in this case, that marine insurance and fire insurance covering the whole of this cargo was effected upon it to its full value after the vessel arrived in Boston, extending from the time the discharge commenced until sales or is discharged into other vessels. Can you state whether it has ever been a question of discussion in the Adjustment Committee as to the propriety of such charges in general average adjustments?

(Objected to.)

Q. What are the functions and duties of the Adjustment Committee of the National Board of Marine Underwriters?

A. Statements are submitted to the Committee from time to time by the various members of the Board with a memorandum of items to which the Company submitting them takes exception, and the opinion of the Committee is asked on those objections, and also, in some instances, questions in dispute are submitted to the Committee for arbitration.

Q. What companies are represented in that?

A. Ours and The Insurance Company of North America, The British and Foreign, The Manheim Insurance Company, and also with us in this suit, and others, The Delaware Insurance Company.

Q. Does that Committee discuss the propriety of such adjustments as are submitted to it and decide for the Com-

panies represented by the Board what items shall be allowed and what items shall not be allowed in such adjustments?

A. Where the questions are submitted to the Committee for arbitration we absolutely decide, but in some instances, of course, our opinion is simply asked, and we presume that the accountants act upon it, but that we do not know.

Q. Your opinion is asked by the underwriters in order to govern their actions?

A. Yes, sir.

Q. Can you state what has been the decision of your Board as to the propriety of the charges which I have mentioned?

(Objected to.)

Q. Will you state what is your opinion, from your experience and knowledge, as to the propriety of such a charge where the vessel puts into a port of refuge?

A. My opinion is, that insurance can not be charged to underwriters on the full value of the cargo discharged. My opinion is strengthened by the fact that it has been before the Adjustment Committee of the National Board, of which I am a member, and the whole Committee, of which I was a member at that time and present, decided that it was not a proper charge.

Q. Do you know what the custom is in regard to such a charge among insurance adjusters as to the payment of it by insurance companies?

A. I can only say this much, that we would not admit it ourselves, and we never have.

Q. Do you know whether there is any universal custom to charge such insurance?

A. I am not aware of it.

Q. You never heard of such a custom being universal among adjusters?

A. No, sir.

Q. In your experience in The London Assurance, do you have many adjustments come before you?

A. Yes, sir. It is one of my principal duties to examine every adjustment and to adjust some cases, of partial loss, for instance, which are presented. Every adjustment which comes into our office is examined by me, and according to whether I pass it or not, it is paid or objected to.

Q. You have a great many adjustments come before you?

A. A great many.

Q. So that you are familiar with the customs and manners of adjusting losses?

A. Yes, sir.

CROSS-EXAMINATION.

By MR. TILTON:

×*Q.* You are not an average adjuster yourself, are you?

A. Except in this way, that I frequently adjust losses which friends and clients send us in papers, and leave it to me to make up the adjustments.

×*Q.* You have never been in the business of an average adjuster?

A. No, sir; I have never been in that business as average adjuster.

×*Q.* You have only acted in cases where your own Company has been concerned, and with the assent of the assured?

A. Yes, sir, I frequently have been consulted by other officers as to adjustments.

×*Q.* But you have not made them up?

A. I have not made them up.

×*Q.* You say this question of the propriety of allowing insurance under such circumstances has been frequently discussed in your Committee?

A. It has been discussed; yes, sir. When it was

discussed it was spoken of by the older members of the Committee, who had had a great deal more experience than I had, as being one about which there was no question. It was a recognized fact that the underwriters were not liable for it.

×*Q.* If that were true, why was it referred to your Committee as a matter proper for its decision or arbitration? If it were not a matter about which there is a difference of opinion, how did it come before you at all?

A. It would have been included in an adjustment, and the Company would have objected to it.

×*Q.* Then in every instance where it has come before your Committee the question has arisen in that way?

A. Yes, sir.

×*Q.* That it has been included in the adjustment?

A. Yes, sir.

×*Q.* And you would say from that circumstance, that in the opinion of the Adjusters it was properly included or they would not have put it there, would you not?

A. I presume an Adjuster would not put anything in a statement which he knew to be incorrect positively. He might be doubtful about it.

×*Q.* Then it merely amounts to a difference of opinion between your Committee and the Adjusters?

A. In that particular instance. Some adjusters might hold different views. The particular occasion that I am thinking of at the present moment was a case which was adjusted, I believe, by Messrs. Johnson-Higgins.

×*Q.* You remember in that particular case there was a liability under the policies admitted, do you not, and it was a mere question of ascertaining the amount of that liability?

A. I do not quite understand your question.

×*Q.* Did the underwriters in that case deny all liability, and had they denied it from the commencement?

A. Not that I am aware of. Some items in the adjust-

ment were probably admitted. Some part of the adjustment was probably admitted as correct.

×*Q*. But there had been no denial of any liability on the part of the underwriters?

A. That I had no means of knowing.

By Mr. Lewis:

×*Q*. You have said there was no universal custom. You emphasized the word "universal" or Mr. Parkin did. As a matter of fact, insurance of this character is charged by adjusters, is it not, and allowed by them?

A. It is sometimes charged in England, but there is a difference between the custom here and the custom in England.

×*Q*. Is it not charged here by adjusters?

A. Not that I am aware of.

×*Q*. You have never seen it charged in an adjustment.

A. I can't say that I have never seen it. I may have seen it in some of our own statements and objected to it. I frequently see items in statements not objected to, but which are finally either thrown out or compromised.

×*Q*. How has it been frequently discussed in your Committee unless it came before them allowed by adjusters in adjustments?

A. If you refer to my previous answer, I don't think I said frequently.

×*Q*. How often has it been discussed?

A. I was thinking of one particular case.

×*Q*. Then it has only been discussed once?

A. In Committee once I am thinking of.

×*Q*. Only once?

A. That is the only time that I recall.

×*Q*. Then you recall no other instance in which the question has ever come before your arbitration or Adjustment Committee except once?

A. I should explain that I am a comparatively recent member of the Committee.

× Q. I am asking you as to your own knowledge. In one instance only you ever remember the question coming before your Committee?

A. That is the only one I have any personal knowledge of.

× Q. And at that time it was allowed by an average adjuster?

A. It was included in the adjustment.

× Q. And was allowed by an average adjuster? Is that so?

A. I presume it was inserted by the adjuster.

× Q. Was it or was it not?

A. It was inserted by the adjuster.

× Q. You saw the adjustment?

A. Yes, sir.

× Q. The adjustment contained the allowance?

A. Yes, sir.

× Q. You say that it is the custom universally to allow it in England; is that so?

A. No; I don't say universally. I say it is sometimes allowed in England. Generally the underwriters there are consulted first, and it is generally done in that way, that the underwriters are consulted as to whether they will wish the insurance effected or not. That is my personal experience.

By Mr. Tilton:

× Q. As those who are charged with the safe keeping of the cargo are expected to protect it in every practicable way, what is the objection to this insurance as a means of such protection?

A. Our objection to the insurance is that the cargo is at our risk during the time it is discharged, if the vessel has put into a port of distress and is discharged through necessity.

× Q. That the cargo is at your risk?

A. Yes, sir. We take the position that no one has a

right to re-insure our risk for us unless they have our authority. And furthermore, there is a clause contained in most policies which states they are null and void to the extent of any former insurance; and it is very doubtful whether we could get the benefit of any insurance effected even if we did admit it.

Q. If the real objection is that the cargo is already covered by the original policy, that, of course, imports a case in which liability under the policy is admitted, and not disputed, as in this instance?

A. As I understand it, our liability in this case was denied not for general average. As I understand it, as far as I know—I may be wrong—something may have been done by somebody I know nothing about, but as far as my personal knowledge goes, and I have seen everything that has transpired in the case from first to last, I do not know that we have ever said that we do not admit liability for proper general average charges.

× *Q.* To what extent did you deny your liability, and when did you deny it?

A. As I understand it, we did not deny our liability; I do not remember having done so. I may be wrong. Perhaps you can bring some evidence which will make that clear in another way, but I do not think we denied liability until the statement was presented. We denied liability for total loss which was claimed from us at one period.

× *Q.* While this cargo was being handled in Boston, did your Company understand that it was liable for a partial loss?

A. We had had no profits submitted. We had no means of knowing. No proofs of loss had been submitted to us at that time.

× *Q.* Do you know whether your Company refused to take charge of the cargo there, and do whatever was necessary for its protection?

A. I do not. I should think that would be a very unusual course for us to pursue in any case.

× *Q.* Do you remember whether a tender was made to you of an abandonment of the cargo, with a request that you look after it?

A. Yes, sir; I remember that an abandonment was tendered, and we declined to accept it.

× *Q.* What reply did you make to that?

A. We declined to accept it.

× *Q.* You would see reasons for effecting this insurance in a case where liability was denied or disputed under the original policy, and in the case where such liability was admitted, would you not?

A. We would have nothing to do whatever with that. If we thought we were not interested we should have nothing whatever to do with it in one way or the other until our liability was proven.

× *Q.* Do you think it would be a reasonable course for a cargo owner, who had reason to believe that liability was to be contested under the original policy, not to re-insure under such circumstances?

A. That would be a matter for him to decide. Yet, in my opinion, he would have to pay the premium if we were found to be liable. It is for him to decide whether to pay the premium, or run the risk of losing the premium.

By Mr. Parkin:

× *Q.* The instance which you have referred to as being discussed in the Board was one where this charge for insurance had been made in the adjustment?

A. Yes, sir.

× *Q.* And that was objected to by the Insurance Company to whom it was presented?

A. It was.

× *Q.* As being improper?

A. Yes, sir.

× *Q.* And they referred it to the Board?

A. Yes, sir.

× *Q.* And the Board unanimously decided that it was improper, did it not?

A. Yes, sir.

By Mr. Lewis:

× *Q.* What Company was that?

A. This particular adjustment was submitted by The Thames and Mersey Marine Insurance Company, as I remember it. I am not quite certain about that. I don't recollect for certain whether that was the Company. It was either that Company or probably The British and Foreign.

× *Q.* I understand you to say that according to the British Lloyds the adjusters included such insurance; is that so?

A. In a case where the underwriters had been consulted and had requested the insurance to be effected for their benefit.

× *Q.* If they had made no request, have you any knowledge as to what is the custom under the British Lloyds?

A. I should say it would not be included, unless the underwriters had been consulted.

× *Q.* Have you any knowledge of what is the custom under the British Lloyds?

A. I do not recall at the moment particularly whether that is the custom or not.

× *Q.* You say you have no such knowledge?

A. No; I do not, for certain, know one way or the other. The cases I refer to were where I was interested as a broker, not personally, but where I was employed by a broker, and where I had to get the consent of the underwriters or consult them as to whether they would have insurance taken out on the cargo discharged at ports of distress.

× *Q.* That is, I understand, that you had a particular case, in which, as a broker, you did consult the underwriters to find out whether insurance had been taken?

A. Yes, sir. That is not the only instance. There are other instances.

×Q. What other instances have you had?

A. Similar cases. Cases would crop up every now and then.

×Q. That is under the British Lloyds?

A. Yes, sir.

×Q. You were in business in England?

A. I was in business in England; yes, sir.

×Q. What you mean is that you consulted the underwriters on the cargo, when effecting an insurance of this character; is that so?

A. No; it was not necessary that I or that the firm I represented effected the insurances, but the firm I represented probably had effected the original insurances, and before the agents of the ship would take out insurances on cargo discharged, they would consult the underwriters as to whether they wished that done, and would pay the premium.

×Q. How long have you been in business in New York City?

A. I have been in New York since 1889. In 1876 I first started in connection with the Lloyds in London. With the exception of a few months I have been steadily at the marine insurance business all my business life, which dates back since 1876.

×Q. Was that connection with the British Lloyds as insurance adjuster or as insurance broker?

A. As an insurance broker. I frequently had to examine adjustments, of course, and had to get them settled by Companies and had to go into objections that they might make from time to time. In that way adjustments were frequently brought under my notice.

×Q. I suppose you found that Companies very frequently objected to them?

A. Sometimes they would be objected to and sometimes not, just as it happened.

×*Q*. You have had a great many cases in which they did swallow them whole?

Q. Yes, sir; a great many.

By Mr. Parkin:

×*Q*. In my question with regard to the insurance, I think I used the term "insurance for full value," I meant to use the term "insurance generally for all interests." Is it the custom to insure in that way for all interests and charge the premium in general average?

A. Do you mean to insure the full value of the cargo discharged for the benefit of all interested?

×*Q*. I mean to insure the cargo generally for the benefit of all interests?

A. Not the full value.

×*Q*. Is it customary to insure the cargo itself for the benefit of the owners of the cargo?

A. No; not for the benefit of the owners of the cargo.

×*Q*. That, you say, is covered by the original policy?

A. That is covered by the original policy.

×*Q*. Nor is it customary, as I understand it, to insure it practically for the benefit of the original insurers—to re-insure it, in other words?

A. No, sir.

By Mr. Tilton:

×*Q*. While your testimony seems to relate to the custom, your knowledge of the matter is based upon the instances to which you have referred as coming before your Committee?

A. Yes, sir; and to a general study of the question and to discussions with underwriters and adjusters on various points in the course of my business.

×*Q*. Can you name any other instances?

A. No; I do not recollect any other instance, but I think it must have come up, because the question is very firmly fixed in my mind, prior to the instance I have referred to before the Adjustment Committee.

×*Q.* Was that a case where the re-insurance was for full value or for the import value of the damaged cargo?

A. I don't recollect as to that. It purported to be an insurance on the cargo as cargo.

By Mr. Parkin:

×*Q.* It was not a case of insurance of any special interests in the cargo at all?

A. No, sir.

×*Q.* It was a general insurance, the same as in this case?

A. Yes, sir. A general insurance.

By Mr. Tilton:

×*Q.* I suppose if anything had happened to the cargo while it was covered by these later policies, your companies would have been very glad of the step taken?

A. The point is, we fear we should not have been any better off, because of the clause which is contained in all policies stating that they are null and void to the extent of any prior insurance. That is one of the grounds on which we object to being charged with insurance.

By Mr. Lewis:

×*Q.* I understood Mr. Johnson to say that your Company and the others who had the original risks, were solicited to insure the wheat in transit? Do you remember anything about that?

A. No, sir.

×*Q.* He said that application was made to your companies for insurance and you all refused it? Is that so?

A. I have no knowledge of it having been submitted to us. If it had been submitted to our agents here they probably would have submitted it to our agents in New York, and I am certain they did not do that.

By Mr. Tilton:

×*Q.* Do you mean by your testimony that even your

Committee could find any objection to re-insurance relating to a time after the original voyage was terminated?

A. I am not prepared to state on that subject. I have my own opinion, but that question was not brought up, as the case before the Committee that I refer to was one in which the voyage was not broken up. The voyage was finally continued, as I remember it.

By Mr. Lewis:

×*Q.* It was a different case from this one in that respect?

A. Yes, sir. In that respect.

×*Q.* You have no knowledge of the fact that Mr. Shope, of the firm of Johnson-Higgins, consulted all of the underwriters on this cargo, and asked them to take the risk after the discharge?

A. No, sir. I have no knowledge of that.

×*Q.* You say that your Philadelphia agent would probably have reported to your New York office had he had such a request?

A. Yes, sir; probably.

×*Q.* You do not claim that any notice was given to the parties in interest here not to effect that insurance?

A. No, sir. We had no knowledge.

×*Q.* You mean you had no knowledge?

A. Yes, sir; we personally had no knowledge. I think the insurance you are speaking about is probably the insurance effected by Mr. Johnson, whereas the insurance I am particularly referring to is that effected by Peter Wright & Sons.

(Mr. Parkin requested the counsel for libellants to admit that the market price of No. 2 red winter wheat on the following dates was as follows:

March 6, 1891, $1.06½.
March 7, 1891, $1.07½.
March 9, 1891, $1.07¾.
March 11, 1891, $1.07.
March 12, 1891, $1.08.)

Counsel for libellant state that subject to their objection that the evidence is immaterial, and to their right to verify the figures, they have no objection to the offer.

Adjourned until Wednesday, December 6, 1893, 11 a. m.

WEDNESDAY, December 6, 1893, 11 a. m.

Present.—THE COMMISSIONER (MR. PUGH,) and MESSRS. LEWIS, TILTON & PARKIN, of counsel.

MR. BENJAMIN RUSH having been re-called on behalf of the libellants, was examined as follows:

By MR. LEWIS:

Q. At the last meeting before the Commissioner, objection was raised to the item of insurance covering cargo after it had been discharged from the *Liscard*, and testimony was taken in reference to the propriety of that charge. Please state whether or not it has been your custom to allow it in adjustments?

(Objected to. Objection sustained.)

THE COMMISSIONER: You can ask the witness whether it is customary to allow it in adjustments.

THE WITNESS: I think so, fully. I have always done it in adjustments that I have made.

By MR. LEWIS:

Q. Have you ever had any objection made to the allowance?

A. I cannot recall any.

Q. The agents for The London Assurance Company, with whom you dealt here, are Messrs. Brockie & Welsh?

A. Yes, sir.

Q. Who are the agents for The Manheim Company?

A. Messrs. Barker & McCall.

Q. Have you ever had any adjustments with these gentlemen, or either of them, in which marine insurance was charged and not objected to?

A. I have had one adjustment that I recall with Messrs. Brockie & Welsh.

Q. For whom did they act in the adjustment that you speak of?

A. They acted as brokers.

Q. For whom did they put the insurance?

A. I do not recollect.

Q. What was the name of the case?

A. It was the case of the steamer *Bracadale*. Insurance was effected there upon the cargo after distress and discharge. The vessel put back here twice in distress; a portion of her cargo of grain was discharged, and insurance was effected on that grain, while discharged into lighters, by Brockie & Welch, at the request of Peter Wright & Sons; the bill was handed to us by Peter Wright & Sons for adjustment, and by us included in the statement.

Q. You say that in that case, Brockie & Welch actually effected the insurance upon the grain after discharge?

A. Yes, sir.

Q. You made up the adjustment in your office in the case of the *Bracadale?*

A. Yes, sir.

Q. Was, or not, that item of insurance objected to?

A. I heard no objection by any underwriters that I collected from.

Q. Do you remember any connection of The Insurance Company of North America with that insurance?

A. The North America originally insured the cargo.

Q. The Insurance Company of North America are

members of the National Board of Underwriters, are they not?

A. I don't know whether they are now; they used to be.

Q. Then do I, or not, understand you correctly to say that it is a custom to effect insurance upon cargo discharged from a vessel putting into a port of distress, and that that insurance is not objected to by the underwriters?

A. It is very generally done. It is not done, so far as I know, in every single instance, but when it is done, I have never known it to be objected to before.

Q. Is it done where the facts are similar to those of the *Liscard?*

A. Yes, sir.

Q. Where the circumstances are similar to those of the *Liscard*, is it universally done?

A. Yes; I think so.

Q. In the case of the *Bracadale*, about which you have been speaking, were the facts and circumstances substantially similar to those of the *Liscard*, except that the port was Philadelphia instead of Boston?

A. No; not altogether. There had been no objection raised by the underwriters on behalf of the cargo, denying liability.

Q. That is, in the case of the *Liscard*, as I understand it, the liability of the underwriters of the cargo was denied from the beginning?

A. Yes, sir.

Q. But in the case of the bark *Bracadale*, there had been no denial?

A. No, sir.

CROSS-EXAMINATION.

By MR. PARKIN:

×*Q.* In the case that you have mentioned, Brockie & Welsh acted as brokers, you say, in placing the insurance?

A. I believe so.

× *Q.* Do you remember the amount of that insurance?

A. There were two insurances placed, the vessel having put back here in distress; I think the amounts were $18,000 or $19,000; I am not positive about that.

× *Q.* Do you remember what the value of the cargo was?

A. No; it was a full cargo of wheat.

By MR. TILTON:

× *Q.* The cargo was discharged in that case from the steamer into lighters?

A. Yes, sir.

× *Q.* And the insurance covered the cargo in lighters?

A. Yes, sir.

× *Q.* How long ago was the *Bracadale* lost?

A. Last January or February.

By MR. PARKIN:

× *Q.* Brockie & Welch in that case did not represent The London Assurance Company as agents?

A. I don't know where they placed the insurance; I forget. My impression is that they placed it as brokers; they may have placed it in The London Assurance Company for all I know.

× *Q.* Do I understand you to say that it is the universal custom, in all cases where cargo is discharged in that was, to insure the cargo generally as cargo, or is it the custom to insure all interests in it; for instance, to insure Peter Wright & Sons for their disbursements on account of the cargo?

A. It is generally customary, whenever insurance of that nature is placed, to cover the full amount of the cargo discharged.

× *Q.* I ask you if it is the universal custom to do it—do you mean to say that it is done in all cases?

A. It is not done in every case, no, sir.

× *Q.* You are now speaking, I suppose, of the custom in Philadelphia; you are not familiar with the custom in other parts of the United States, I suppose?

A. There is a general law and custom of average adjusting throughout the country, and the custom of Philadelphia does not vary from other parts in that respect.

×*Q.* I ask you whether you know of your own knowledge that it is customary to insure cargo, where it is so discharged, in other parts of the country?

A. It is customary in New York, Boston, and Baltimore.

×*Q.* Have you had personal experience in those places?

A. I have seen adjustments in them.

×*Q.* In those adjustments, how was the insurance charged—was it especially charged to cargo, or general average?

A. That would depend entirely on the circumstances of the case.

×*Q.* How about the *Bracadale?*

A. As I recollect, the *Bracadale* was charged to general average.

×*Q.* Do you remember the form of the original policy in the case of the *Bracadale?* I do not mean insurance effected after the cargo was discharged, but the original insurance?

A. I don't remember exactly; my impression is that it was the ordinary grain policy, with the English condition clause attached.

×*Q.* Had there been any collision in the case of the *Bracadale*, if you remember?

A. I think so. She was cut through by the ice.

×*Q.* That was the reason why she put back?

A. Yes, sir.

×*Q.* How long have you been in the business of adjuster?

A. As man and boy, for about nine years.

×*Q.* How long have you been making up adjustments?

A. Since about 1887.

×*Q.* How many adjustments have you made up where the facts were similar to those in the case of the *Liscard?*

A. The *Liscard* was a case that had all its own facts by itself. Every adjustment differs.

By the Commissioner:

×*Q.* Have you ever known the propriety of re-insurance questioned by anybody under these circumstances?

A. Myself and other members have occasionally discussed it.

×*Q.* Do you mean in making up adjustments?

A. Yes, sir.

×*Q.* But has it ever been questioned by any of the persons called upon to pay it, or any part of it?

A. Not in my experience.

×*Q.* Has any point been raised with regard to it by any such persons that you have known of, or has it merely passed *sub silentio*, because it was in the adjustment?

A. I have never had that exact point objected to in any statement that I have ever made up, or that has come under my knowledge.

Allan D. Wilson, a witness for libellant, having been duly sworn, was examined as follows:

By Mr. Lewis:

Q. You are connected with the firm of Johnson & Higgins, of Philadelphia?

A. I am.

Q. How long have you been connected with that firm?

A. About two years and a half.

Q. How long have you had experience in average adjustments—I mean in making up adjustments, passing upon them, and reviewing questions concerning them?

A. About two years.

Q. Objection has been made before the Commissioner in this case, as to the item of re-insurance effected on the cargo discharged from a vessel after she had put into a port of distress. In your experience, has that question come before your firm?

(Objected to.)

Q. Do you know of any custom among average adjustors with respect to charging in the adjustment the item of insurance upon cargo discharged from a vessel which has put into a port of distress?

A. Yes, sir; if you mean fire insurance. There is a custom to include that, provided there is a bill for it—provided the insurance is effected.

Q. Referring to instances in which cargo has been discharged from a vessel into lighters, have you ever had a question raised in your experience as to the propriety of charging that item?

A. We have charged it.

Q. Have you ever known of a case in which such charge has been objected to?

A. No, sir.

Q. Is there or not a custom among insurance adjusters to include such a charge in the adjustment, where insurance is effected?

A. There is; yes, sir.

CROSS-EXAMINATION.

By MR. PARKIN:

×*Q.* How many adjustments have you made up yourself?

A. I don't know that I can tell you exactly. I have made up adjustments continually for two years there, but as I don't remember, I couldn't say.

×*Q.* Do you, yourself, pass upon the propriety of the various charges put into the adjustment?

A. Yes, sir; I do, in making up the adjustment, although, of course, all of our adjustments are looked over by more than one man.

× *Q.* Do you decide whether the items included are proper items to be charged or not?

A. Yes, sir.

× *Q.* Do you mean to say that in all cases insurance is effected upon cargo where it is discharged at a port of distress?

A. No, sir; I would no more say that than I would say that insurance is always effected on every cargo that goes on every voyage; some men never insure, and others always insure; for instance, I adjusted a case last spring where a vessel had a cargo of pig iron which was discharged. They very naturally did not want to put fire insurance on that pig iron.

× *Q.* Have you had any experience in cargoes of wheat?

A. I assisted on the *Bracadale* adjustment. I don't remember any other adjustment of a wheat cargo; wheat cargoes being mostly adjusted on the other side.

× *Q.* How long did you say you had been engaged in making up adjustments?

A. Two years.

× *Q.* What was your business before you began making up adjustments?

A. Clerk with Johnson & Higgins immediately before that time.

× *Q.* Have you had experience in the office of any other adjuster before that time?

A. No, sir.

× *Q.* Before you went with Johnson & Higgins, did you have any experience at all in marine insurance?

A. No, sir.

× *Q.* How many adjustments do you say you had made up where insurance has been included?

A. I don't know. I can't remember how many.

× *Q.* Do you know whether or not in the case of the *Bracadale*, the original insurers were informed at the time that the re-insurance was taken out?

A. I do not.

× *Q.* I suppose the question whether such insurance shall be effected or not must depend upon the circumstances of each case?

A. Yes, sir.

× *Q.* And, of course, that would govern the propriety of charging it in general average, would it not?

A. I should think so, decidedly; yes, sir.

RE-DIRECT EXAMINATION.

By MR. LEWIS:

Q. Are or are not adjustments made up where cargoes of wheat are discharged at a port of distress comparatively rare on this side of the water?

A. They are exceedingly rare, because the law is that the adjustments shall be made at the port of destination, and shall be covered by the law of the port of destination, and as this side of the water is the destination for wheat in very few instances, adjustments are very seldom made up here, except in a case like the *Liscard*, where the voyage is broken up.

By MR. TILTON:

Q. You say that circumstances might determine somewhat the propriety of charging the expense of further insurance to general average, or as a special charge. State whether, in a case where the underwriters under the original policy disputed their liability, that would in your opinion be a case where further insurance ought to be effected?

(Objected to.)

A. I think very decidedly so.

THE COMMISSIONER: I do not think the witness'

opinion is of any consequence on that subject at all, although it will perhaps do no harm to put it down.

By Mr. Parkin:

Q. You have never had experience in such a case, have you?

A. No, sir. It approaches the line of a case of a man who was not insured at all.

By Mr. Tilton:

Q. You have said that it has been your practice, and is the custom, as you understand it, to put such charges into average account. State whether charges so placed in the accounts that you have made out have been paid by the underwriters or the parties in interest?

A. They have, without any exception.

William W. Curtin, a witness for libellant, having been duly sworn, was examined as follows:

By Mr. Lewis:

Q. What is your business?

A. Insurance and average adjusting.

Q. How long have you been engaged in that business?

A. Twelve years. That is, in average adjusting twelve years, and in the insurance business about eighteen years.

Q. You are connected with the firm of Johnson & Higgins?

A. I am a member of that firm.

Q. That firm has offices not only in Philadelphia, but elsewhere in this country, has it not?

A. Yes, sir; we have offices in New York, Boston, Baltimore, New Orleans, and San Francisco, as well as Philadelphia.

Q. During the time that you have been connected

with the firm, and have been in the insurance business, have many average adjustments come under your knowledge?

A. Yes, sir; a great many.

Q. Have you assisted in making them up?

A. I have been responsible for that. I am not an average adjuster myself. I am responsible for the average, and it is made up in my office under my supervision.

Q. You know the custom, I presume, by which average adjusters guide themselves in making up adjustments?

A. Yes, sir; certainly.

Q. Is it or not a custom among average adjusters to allow the expense of insurance where a cargo has been discharged from a vessel at a port of distress, under circumstances similar to the discharging of the *Liscard*?

A. Always customary.

Q. Have you ever had any objection raised to any adjustment made up in your office where such an expense for insurance has been allowed?

A. We never have. If there is objection raised now, it is the first we have ever had.

Q. That is, the *Liscard* is the first that you have ever had?

A. Yes, sir.

Q. About how many times do you think, in your experience, there have been claims allowed for the expense of insurance?

A. That would be rather hard to answer, because it so largely depends upon conditions. I should say very many times.

Q. Have those adjustments passed under the eye of the insurance agents, and ship's husband, not only in Philadelphia but elsewhere?

A. Yes, sir.

Q. Under those circumstances, have the claims set forth in the adjustment been paid without any objection

to this item—I mean to say, was there any objection to this item?

A. That is simply answered the same as before, but until this case, I have never known objection raised to the charge.

Q. I understand you to say that it is the custom among average adjusters to allow this expense for insurance under such circumstances. I now ask you whether it is the custom among ship's agents, ship's husbands, and persons having charge of the discharge of the cargo, representing all interests, to effect such insurance?

A. It has always been our experience that we have. I don't know whether I am called upon to say anything further, but I would say that, of course, the ship is responsible; they are the parties who make up the average, and they are responsible to all interests for all interests, and a ship's broker would be derelict in his duty, to my mind, unless he did protect the cargo in that way.

CROSS-EXAMINATION.

By MR. PARKIN:

×*Q.* Suppose a cargo is already protected by insurance, you do not mean to say that it would be necessary to protect it a second time, do you?

A. Yes; cargoes are almost always protected by marine insurance; this additional protection is simply for the protection of the marine underwriters, and that would be on the cargo. It has become practically a custom to do that, at least, with all interests that we have ever had—to again protect the underwriter of the cargo by this additional insurance while in a port of distress.

×*Q.* It is effected, then, for the benefit of the insurer?

A. For the benefit of the underwriter.

×*Q.* Is it effected as re-insurance, or how?

A. It is effected as direct insurance; if in the name of the ship broker, in his name for account of whom it may concern, and if in the interest of the underwriter, in the name of the underwriter.

× *Q.* Under the ordinary form of policy?

A. Under the ordinary form of policy. When I say ordinary form, each written portion of a policy is according to that policy itself. You cannot say ordinary form. It is on the ordinary printed policy, but the wording of the policy takes precedence of the printed condition, and that is changed with every policy.

× *Q.* You say that when it is effected by the ship's broker, it is effected for account of whom it may concern?

A. Yes, sir.

× *Q.* You say that it is sometimes effected by the Insurance Companies themselves?

A. Yes, sir; sometimes—that is, I mean to say that we have very often placed insurance for marine Companies who have placed that business in our hands to do, but more often the insurance comes to us through ship brokers, husbands of the ship, and who give this protection to the cargo.

By Mr. Tilton:

× *Q.* For what sum is it customary to insure—the value of the merchandise or the charges upon it?

A. The value of the merchandise.

× *Q.* You don't know whether there is any communication between ships' brokers and underwriters in regard to the re-insurance before it is effected?

A. I know that there is not, as a rule; there may be an exceptional case, but it is so much a custom and a habit that we never hesitate about it. I mean to say, that if a man should come into my office, a ship-broker, and ask me to advise, I would not hesitate a moment as to the advice that I would give him.

By Mr. Lewis:

× *Q.* About how many adjustments are prepared by your firm of Johnson & Higgins in the course of a year?

A. That would be very difficult to say.

× *Q.* Your firm has quite a large business of insurance adjusting, has it not—that is, average adjusting?

A. We have, I think, the largest in this country; that is because all our offices are adjusting offices, in California, Boston, and everywhere else.

Adjourned to 11 a. m., Wednesday, December 13, 1893.

WEDNESDAY, December 13, 1893, 11 a. m.

Present.—THE COMMISSIONER.

Adjourned to Thursday, December 21, 1893, at 1.30 p. m.

THURSDAY, December 21, 1893, 1.30 p. m.

Present.—THE COMMISSIONER.
MESSRS. LEWIS and TILTON.
MR. PARKIN.

Libellants offer in evidence a letter from Mr. Henry, attorney for respondent, dated Philadelphia, October 11, 1893, in this case, addressed to Curtis Tilton, Esq., of counsel for libellants.

Mr. Parkin objects to the offer.

The Commissioner declines to receive the letter in evidence.

Libellants also offer in evidence the Average Adjustment and Statement of Special Charges, made by Johnson & Higgins, average adjusters, and the same is marked "Libellants' Exhibit 550."

Libellants produce, in response to respondents' call, certain policies and certificates of insurance upon the cargo in the elevator and in lighters at Boston. They are marked "Exhibits 501 to 514 inclusive."

Testimony closed.

Argument proceeded with by Mr. Tilton for libellants and Mr. Parkin for respondents.

THURSDAY, March 1, 1894, 2.30 p. m.

Present.—THE COMMISSIONER.
MESSRS. LEWIS and TILTON, for libellants.
WM. PARKIN, ESQ., for respondents.

(Meeting held at the request of Mr. Lewis to allow him to adduce additional testimony on the question of commissions of Lawrence Johnson & Co.)

(Mr. Parkin objects to the opening of the testimony for any purpose; and if the Commissioner decides to open it, the testimony be limited to the two and a-half per cent. commissions of Lawrence Johnson & Co.: and that terms be imposed on libellants as a condition of such re-opening.)

(The Commissioner rules that as Mr. Lewis has stated that there was an inadvertent omission in the testimony, and as the Commissioner's Report has not yet been completed, opportunity should be given to correct what is alleged to be a palpable error in the testimony as given.)

(Mr. Lewis offers in evidence letters of Lawrence Johnson & Co., two dated April 29, 1891, and September 15, 1891, and another dated November 14, 1891, as bearing upon the question of the compensation of Lawrence Johnson & Co., and also as showing that the proofs of loss were submitted under date of April 29, 1891, about six months sooner than the date from which the Commissioner has allowed interest. The letters are marked "Exhibits 515, 516, 517," respectively.)

(Mr. Parkin objects to the letters, as not bearing upon the question.)

(The Commissioner can see nothing in the letters bearing upon the question of commissions, and, strictly, perhaps, the letters should not be admitted in evidence: but he will annex them to the testimony taken, as exhibits, so that they may be before the Court. The Commissioner takes occasion to say, however, that he sees nothing in

these letters produced which will change his views already expressed that interest should be computed beginning December 15, 1891.)

(Mr. Parkin excepts to both rulings.)

(Mr. Lewis offers in evidence printed copy of the rates of commission recommended by the Chamber of Commerce of New York.)

(Mr. Parkin objects to this copy. It is not proved to be from the Chamber of Commerce.)

(The Commissioner sustains the objection.)

W. W. CURTIN, being re-called, was examined as follows:—

By MR. LEWIS:

Q. You are a member of the firm of Johnson & Higgins?

A. Yes, sir.

Q. You said before you had offices in what cities?

A. New York, Boston, Baltimore, New Orleans, San Francisco, and Philadelphia.

Q. As average adjusters, have you passed upon the rates of commission allowed for the sale of damaged cargoes?

A. In making up adjustments, we put them in our adjustment in accordance with the rules.

Q. How long have you been connected with the firm of Johnson & Higgins?

A. Nine years.

Q. As a partner, nine years?

A. No, sir.

Q. How long have you been connected with Johnson & Higgins as a partner?

A. Since the first of last January.

Q. How long has the firm been in existence?

A. About in the neighborhood of fifty years.

Q. During your nine years' connection with the firm of Johnson & Higgins, can you tell me about how many cases have passed under your observation, in which you have passed upon the rate of commission to be allowed for the sale of damaged cargoes?

A. Oh, no.

Q. Would it roll up into the hundreds, do you think?

(Objected to by Mr. Parkin, as Mr. Curtin has said he only puts into the adjustment whatever is charged.)

A. I don't know.

WITNESS: As adjusters, we cannot pass upon it.

Q. How many adjustments do you think you have passed on, or have come under your observation during those nine years, in which there has been a commission allowed on the sale of damaged cargo?

A. That would be very hard to tell, because it all depends on the character of the adjustment, and there are not many adjustments where the cargo is sold in an intermediate port.

Q. Does your connection with the firm of Johnson & Higgins, and the experience which you have had with them, enable you to state what percentage or commission is usually allowed or charged for the sale of damaged cargoes?

A. I am not an adjuster myself. I am a member of a firm of adjusters. There are certain members of the firm that are adjusters, and certain other members of the firm are insurance agents. Individually, I am not an adjuster. These adjustments come under my eye because all the adjustments that come from the Philadelphia office have to be signed by me.

Q. Has the experience which you have had with the firm of Johnson & Higgins during those nine years, made you able to say what is usually allowed for the sale of damaged cargoes?

A. Yes, sir.

Q. What commission is usually allowed for the sale of damaged cargoes?

(Objected to by Mr. Parkin.)

(Commissioner admits the testimony.)

(Exception by Mr. Parkin.)

A. Two and a half per cent.

Q. Have you passed upon, in your firm, adjustments in which that commission has been allowed for the sale of damaged cargoes?

A. Not passed upon; made up.

Q. That is, as I understand you, you have made up adjustments in which a commission of 2½ per cent. has been charged for the sale of damaged cargo?

A. Yes, sir.

Q. Have you before you any adjustments in which such a commission has been charged?

A. Yes, sir; I have.

Q. You have five there altogether?

A. I have some of our firm and some from other adjusters as well.

Q. Please give me the names of the adjustments which you say were made by your firm in which a commission of 2½ per cent. was allowed for the sale of damaged cargoes?

(Objected to by Mr. Parkin.)

(The Commissioner admits the testimony.)

(Exception by Mr. Parkin. Mr. Parkin objects on the ground that the question has not heretofore been limited to cargoes of wheat.)

A. National Pier fire, the lighter *Georgia*, lighter *Carolina*, steamer *Cherokee*. These are the adjustments of Johnson & Higgins, in which a commission of 2½ per cent. was allowed for the sale of damaged cargo.

Q. Do you know of other adjustments made up by your firm in which the same commission was allowed and which adjustments you have not before you?

(Objected to by Mr. Parkin.)

A. Yes, sir.

Q. Can you give the names of any of those adjustments?

A. There is only one that I have in mind—the Morgan Line Pier and the schooner *Mabel Jordan*.

Q. Was a commission of $2\frac{1}{2}$ per cent. allowed in these cases also?

A. Yes, sir.

Q. Please state what other adjustments you hold in your hand?

A. Steamship *Brooklyn*.

Q. To whom was the commission paid there?

A. To Mr. Jacob Telfair.

Q. Is he a shipper in New York?

A. Yes, sir.

Q. Was a commission of $2\frac{1}{2}$ per cent. allowed in that case?

A. A commission of 5 per cent.

Q. Was it on wheat?

A. I don't know exactly, but I believe there was wheat concerned.

By THE COMMISSIONER:

Q. Do you know of this case personally or simply from the adjustment? Is that all you know?

A. That is all I know.

(The Commissioner rules that the testimony as to this latter adjustment is not competent, as the witness knows nothing of the case except from the adjustment before him.)

By MR. LEWIS:

Q. The adjustments to which you have referred as being made up by your firm which you have before you and the two which you have referred to which are not before you, was payment made in those adjustments on that basis?

(Objected to by Mr. Parkin.)

A. Yes, sir.

Q. That is, I understand, the parties in interest in the case, paid or allowed a commission of 2½ per cent. for the sale of damaged cargo?

A. Yes, sir.

Q. You have referred to the case of the *Mabel Jordan*. You haven't that adjustment here?

A. No, sir.

Q. That was a case occurring in the city of Philadelphia, was it not?

A. Yes, sir.

Q. What commission was allowed for the sale of the damaged cargo there?

(Objected to by Mr. Parkin.)

A. Two and a half per cent.

Q. Was the adjustment of the *Mabel Jordan* made up in your own office here in Philadelphia?

A. Yes, sir.

Q. Is there any difference drawn in reference to the rate of commission for the sale of damaged grain and other cargoes?

(Objected to by Mr. Parkin.)

A. No, sir.

Q. Is there any one in the business of selling damaged grain—a regular business of selling damaged grain or other cargoes?

A. Not that I know of.

CROSS-EXAMINATION.

By MR. PARKIN:

×*Q.* Your duty, I suppose, Mr. Curtin, as a firm of average adjusters, was simply to enter in the adjustment the rate of commission which the account sales show have been charged, is it not?

A. Well, in making up an adjustment it is incumbent

upon us to know whether that charge would be admitted before putting it in.

×*Q.* Do you mean by that that you go to the parties before to see whether that charge will be admitted?

A. No; we don't inquire, because it is an every day fact with us.

×*Q.* Do you mean to say that in all cases the rate of 2½ per cent. is charged?

A. Where the cargo is sold in an intermediate port.

×*Q.* You have mentioned one case where 5 per cent. was charged?

A. That was not our case.

×*Q.* But you have mentioned such a case, haven't you?

A. Yes, sir.

×*Q.* Are these cases which you have mentioned, cases of damaged wheat?

A. None of these. The one you just spoke of is.

×*Q.* But the cases which you have spoken about, are not damaged wheat?

A. No, sir.

×*Q.* Were any of these cases of total loss?

A. No; an average adjustment would be made up on a total loss.

×*Q.* Not a constructive total loss?

A. Well, it would depend upon a good many circumstances.

×*Q.* Your firm of Johnson & Higgins does not, I suppose, deal in wheat?

A. No, sir.

×*Q.* And you don't make sales of wheat?

A. No, sir.

×*Q.* You don't make sales yourselves of damaged cargoes?

A. No, sir.

×*Q.* Do you know the manner in which the sales were made in the various instances which you have mentioned?

A. I do not personally.

×*Q.* You do not know the circumstances under which they were made?

A. Not personally.

×*Q.* So that you have no knowledge of the amount of labor involved in making those sales?

A. Not personally.

×*Q.* Are these cases arising in New York or in Philadelphia?

A. These are arising in New York. The only case that I cited that was a Philadelphia case was that of the *Mabel Jordan*.

×*Q.* The only cases that come under your notice are cases where is a claim made upon the insurers, I suppose?

A. No. It would not always be so.

×*Q.* So far as the sales are concerned, it would be?

A. Well, not necessarily neither. An average adjustment is the distribution of the values among the interests, whether there is insurance or not.

×*Q.* But so far as the rate of commission is concerned, that only comes under your notice where there is a claim on the insurers, does it not?

A. Not necessarily; no, sir. There may be no insurance and yet there may be a claim for selling the cargo.

×*Q.* But where there is no insurance, the question as to the rate of commissions would be one simply between the commission merchant and the seller, would it not? It would not be involved in the average adjustment?

A. It would as between the different interests; yes, sir. That is, the hull and freight would have to bear their proportion of that commission just as much as the cargo, if the average was made up.

×*Q.* Outside of the information derived and received by you as a member of the firm of Johnson & Higgins, or as connected with the adjustment of losses, you have no knowledge of the rate of commissions in the wheat market, have you?

A. No, sir.

By THE COMMISSIONER:

×*Q.* Mr. Curtin, do you know what the commission on the sale of sound wheat is?

A. No, sir.

×*Q.* Mr. Johnson has testified that the commissions are from one-half a cent to one cent a bushel. Do you know why there should be a difference between the commissions on the sale of sound wheat and damaged wheat?

A. There is a great deal more work in the sale of damaged wheat than in the sale of sound wheat.

By MR. PARKIN:

×*Q.* What is the extra work, Mr. Curtin?

A. The extra work is, first, finding a market. That is a very hard thing to do.

×*Q.* What other work?

A. Taking care of this wheat.

×*A.* What other work? What do you mean by "taking care of the wheat?"

A. I mean seeing that the wheat is properly prepared for the market; finding a market for it.

×*Q.* Those are the things which might occur?

A. I think they are not uncommon. There would be a great deal more labor in the selling of a damaged article than a sound article: although from my business, I know nothing about it.

(Signature waived.)

W. H. LABOYTEAUX, being duly sworn, according to law, was examined as follows:

By MR. LEWIS:

Q. You are connected with the firm of Johnson & Higgins, are you not?

A. I am.

Q. And have been for a few months only?

A. For a few months.

Q. Before that where were you?

A. I was with Wreaks & Loines, average adjusters, of New York, and for two years prior to that time, I was with The British and Foreign Marine Insurance Company.

Q. That is, you were—besides being with Wreaks & Loines, in New York—you were with The British and Foreign Marine Insurance Company, in New York?

A. Yes, sir; in New York.

Q. The office of Wreaks & Loines, average adjusters, is in New York?

A. Yes, sir; it was.

Q. Please state whether during your connection with Wreaks & Loines and with The British and Foreign Marine Insurance Company, you had occasion to have under your notice adjustments which concerned the sales of damaged cargoes?

A. With Wreaks & Loines, I cannot remember a single one. While I was with The British and Foreign I remember a couple. I remember three.

Q. They were the only three that occurred during the time you were connected with The British and Foreign Company?

A. The only ones I can remember.

Q. You cannot remember the names?

A. Yes, sir.

Q. But, as a matter of fact, quite a number did come under your attention, I presume, from what you have said?

A. Yes, sir.

Q. Can you give me the names of those three?

(Objected to by Mr. Parkin.)

A. The *Hudson*, *Louisiana* and *Assyria*.

Q. Please state whether or not you know the rate of commission usually allowed on the sales of damaged cargo at a port of refuge?

A. I do. In the ports of New York, Boston and Philadelphia.

Q. What is that rate?

A. Two and a-half per cent.

Q. Do you know of adjustments in which that rate has been charged?

A. I do.

Q. Do you know whether any objection, which you heard, was raised under these adjustments?

(Mr. Parkin states that all of this testimony is taken under objection.)

A. No; the adjustments were paid on that rate.

Q. You have spoken of three adjustments, in which a commission of 2½ per cent. was allowed, on the sale of damaged cargoes. Please give me the names of those three again?

A. The *Hudson*, *Louisana* and *Assyria*.

Q. Were those cases, in which The British and Foreign Marine Insurance Company was concerned?

A. Yes, sir; they were.

Q. The British and Foreign had a part of the *Liscard* cargo of wheat?

A. Not our office.

Q. Not from your office?

A. Yes, sir.

Q. But your Company did, did it not?

A. Yes, sir?

Q. What was the nature of the cargoes, if you recollect, in the *Hudson*, *Louisiana* and *Assyria?*

The *Hudson* and the *Louisiana* were cotton, and the *Assyria* was general merchandise.

Q. Please state whether or not you know the rules in force of the New York Chamber of Commerce, with respect to the rate of commissions for the sale of cargo?

A. I don't know the rules by recollection.

Q. Do you know what the rules are, generally? You cannot pretend of course to repeat them?

A. I know what the rules say relating to the business that come in our office.

Q. Please look at the pamphlet I hand you, and tell me whether the rules, under the item of "General Business," which specifies the commission on the sales of various materials, upon page 193, are the rules of the Chamber of Commerce and are in force and effect?

(Mr. Parkin objects to the question.)

Q. Where did you get this particular set of rules which are produced here?

A. That was gotten by our New York office from the Chamber of Commerce.

(Objected to by Mr. Parkin as mere hearsay.)

Q. You got a copy of these rules yourself upon a former occasion, did you not?

A. I did.

Q. What is the Chamber of Commerce of New York?

A. It is a body of the merchants of New York who have banded together for the purpose of carrying on business to the best advantage.

By THE COMMISSIONER:

Q. Is it an incorporated body?

A. I think it is. I cannot say definitely. It has rooms and offices. It must be incorporated in having an office.

(The Commissioner rules that the rules of the Chamber of Commerce are not relevant or admissible.)

CROSS-EXAMINATION.

By MR. PARKIN:

×*Q.* You have only mentioned three cases, Mr. Laboyteaux, which have come under your notice while connected with The British and Foreign Insurance Company?

A. Yes, sir.

×*Q.* What were your duties in The British and Foreign?

A. I had charge of the loss department. I was the average adjuster for The British and Foreign.

×*Q.* Do you know how these sales were made in these cases?

A. Most of them were made by auction.

×*Q.* To whom was the 2½ per cent. allowed?

A. To the custodian of the cargo.

×*Q.* Were you familiar with the circumstances under which these sales were made?

A. Yes, sir.

×*Q.* Was any other compensation allowed the custodian except that 2½ per cent.?

A. Yes, sir.

×*Q.* I think you said none of the cases were of wheat?

A. No, sir.

×*Q.* What was the nature of the loss? Was it a total loss?

A. It wasn't a total loss, or the cargo wouldn't have been sold.

×*Q.* A constructive total loss?

A. Yes, sir; the cargo didn't go forward to destination.

×*Q.* Were those losses adjusted as partial losses or as a total loss?

A. They were adjusted naturally as general averages and special charges against the different interests.

×*Q.* How was the loss on the cargo adjusted of all that came under your notice?

A. That was adjusted by the payment of the salvage loss. The total loss was paid by the Company, and the net proceeds of the sale, after deducting this 2½ per cent., was received by them as a credit.

×*Q.* What services did that 2½ per cent. cover in those cases? What services were rendered by the custodian of the cargo for that 2½ per cent.?

A. Well, the selling of it and the custody of it and the handling of the proceeds.

× *Q.* How long was it in his possession?

A. Well, it would vary according to the circumstances. I cannot tell.

× *Q.* Well, in the various cases, have you any idea?

A. It might range from a week to ten days, or possibly two weeks.

× *Q.* Who was the custodian of the cargo?

A. The steamship people. The owners of the cargo being widely separated, and, of course, one man had to be in charge.

× *Q.* And the custodian of the cargo was the steamship agent?

A. Yes, sir.

× *Q.* That was so in all those three cases?

A. Yes, sir.

× *Q.* You say you are with Johnson & Higgins?

A. Yes, sir.

×. Do you know of the cases which have been mentioned by Mr. Curtin at all.

A. I know of them, but I didn't make them up.

× *Q.* But you know of them?

A. Yes, sir.

× *Q.* Do you know how long the custodian of the cargo held the cargo in these cases?

(Objected to by Mr. Lewis.)

(Commissioner admits the question.)

× *Q.* Do you know?

A. No, sir.

× *Q.* You say The British and Foreign Company had an interest in the *Liscard* cargo?

A. Yes, sir; but not through our office, and consequently it did not come under my eye.

× *Q.* Do you know anything about the terms of the settlement that were made by that Company?

A. I do not.

×*Q.* You don't know, as a matter of fact, whether there was any settlement?

A. To my personal knowledge, no.

By Mr. Lewis:

×*Q.* In these cases to which you have referred and testified, I understood you to say, that auctioneer's expenses were paid besides this 2½ per cent.?

A. Yes, sir.

×*Q.* And that a bonus or extra compensation, as I understood, was also allowed to the custodian of the cargo besides the 2½ per cent.?

A. Yes, sir.

(Signature waived.)

R. Winder Johnson, being re-called, was examined as follows:

By Mr. Lewis:

Q. You testified in your examination in reference to the sale of wheat. Did that refer to sound wheat or damaged wheat?

A. Sound wheat; the rules of the Exchange here.

Q. Did your testimony refer to sound or damaged wheat?

A. Sound wheat.

Q. You are familiar with the rates of commission usually allowed for the sale of sound wheat?

A. Yes, sir.

Q. How is sound wheat sold—by sample or how? Just explain?

A. The simple operation is usually by samples or merely as certificated wheat. It is graded as it comes in. The merchant buys here from the West. The Western man places it in cargoes. The merchant man here never sees the wheat; has no trouble about it. It goes to the

elevator. It is passed on by the official inspector as a two red or three red, whatever the grade may be, and it is put in the elevator in a great bin with all the rest of the wheat of the same grade. The man then sells the wheat, and for that work he gets half to one cent, according to the bargain. That is the trade.

Q. Please give me some of the names by which wheat is known when it comes from the West?

A. The usual grade in Philadelphia is No. 2 red—that is the largest quantity.

Q. Do I understand that the person who sells the wheat and earns this commission about which you have testified, handles the wheat physically?

A. Never sees it.

Q. Is the wheat even kept in separate bulk, or is it kept in the warehouse with others of the same class?

A. That is kept in the warehouse with other of the same class.

Q. That is, he sells simply his certificate of wheat?

A. He deals on a paper.

Q. And the thing he sells practically is simply a warehouse receipt, being certificated as to its class?

A. Exactly.

Q. Now, in what respects is the sale of damaged wheat different from that of sound wheat?

A. Damaged wheat in the first place has no recognized standing whatever in commercial circles. It has no inspector's certificate. You have to go to inspect and examine it, separate or divide the lots, according to the way it is damaged, more or less. You must then find customers to buy who are not regular merchants dealing in flour wheat, but who want it for some other purpose. That is to say, for other things, and it is a very difficult thing to deal with. It must be handled; entailing much more detail and work. You must find special customers for it. You cannot go on the Exchange and find customers. You cannot find customers in the regular trade.

You would perhaps sell some of it to men to feed chickens with. You have to find customers for it.

Q. I understood you to say that the buyer of sound wheat frequently, indeed usually, does not see the wheat. Is that so in the case of the buyer of damaged wheat?

A. He always examines it. No one would buy a damaged article without knowing to what extent it was damaged.

Q. This requires then, I presume, to be kept separate from other wheat?

A. It is a very difficult thing to get a place for it, as there are no warehouses fitted for it. It wouldn't be accepted in any warehouse in Philadelphia or New York where the regular grades of wheat are stored.

Q. Would it injure the sound wheat?

A. It would destroy any wheat which would come in contact with it.

Q. Then it would have to be kept in separate apartments?

A. They wouldn't run it through the elevator.

Q. Why not?

A. Going through the same spouts and bins would leave a smell and dirt behind it which would damage the following grain.

Q. Was any auctioneer's expenses entailed by the sale of this wheat in addition to the commission which has been charged?

A. No auctioneers were employed. We did all the work ourselves, with the exception of a grain broker to assist us.

Q. I believe you have already stated that in your opinion the commission you charged was a reasonable and proper one?

A. Most moderate.

Q. How long have you been in the wheat business?

A. Since about 1870; that is, my firm, but not I individually.

Q. You are not a member of the Chamber of Commerce of New York?

A. No, sir.

Q. You don't know these rules (indicating)?

A. No, sir.

Q. Is there any person that makes a specialty of selling damaged cargoes in Philadelphia?

A. No.

Q. They are usually sold by the person who has custody of the damaged wheat for sale?

A. I don't know of any damaged cargo in Philadelphia for five years. There couldn't be a trade.

Q. I mean there is no firm or business house which is in the business of selling damaged cargoes?

A. A firm couldn't exist for lack of business.

Q. When damaged cargoes are sold, they are sold by the people who are unfortunate enough to have the job?

A. Yes, sir; exactly.

CROSS-EXAMINED.

By MR. PARKIN:

×*Q.* The rate you have specified, one cent to one-half of a cent a bushel, is the rate of the commission merchant in Philadelphia?

A. The commission merchant for grain from the West.

×*Q.* And what is the broker's?

A. One-eighth or one-quarter per cent. It varies. You can perhaps find two or three different rates.

×*Q.* That is in addition to the commission?

A. Yes, sir; provided that it is sold here.

×*Q.* Is that the usual way of selling it through a broker; I mean, of course, sound wheat?

A. There are two ways. If you deal with the Western merchant there is no brokerage. If you deal with the local wheat owner or merchant, there is a broker.

×*Q.* I mean in the case where you represent the

owner of the wheat as a commission merchant, and you wish to sell that here in Philadelphia for him; do you sell that through a broker?

A. Usually through a broker.

× *Q.* You have no house in New York?

A. No, sir; we have an office there and a clerk, but we have no regular house.

× *Q.* Do you make sales of wheat in New York?

A. No; we buy from there, but we don't sell there.

× *Q.* Do you know what the rates of commission in New York are for selling sound wheat?

A. Broker's commission of one-eighth.

× *Q.* I mean commission merchants'?

A. No, I don't know what it is. I think it is the same as in Philadelphia.

× *Q.* You don't know?

A. No, sir; not from my own knowledge.

× *Q.* Have you ever before sold a cargo of damaged wheat?

A. Never; we have never had a cargo of wheat broken up in an intermediate port before.

× *Q.* And this wheat was sold through a broker, was it not?

A. Yes, sir.

× *Q.* What are the broker's duties in selling sound wheat?

A. He shows his sample. If it is sold on a particular sample he simply sells so much of the grade as "No. 2, red," or "3, red," and goes from office to office, and shows his samples on the floor of the Exchange.

× *Q.* That is, he goes from office to office offering the wheat?

A. Yes, sir.

× *Q.* Or on the Exchange?

A. On the floor of the Exchange; yes, sir.

× *Q.* What are the duties in selling damaged wheat?

A. By some samples; but he deals in a different class of customers.

×*Q.* Was this wheat on the *Liscard* sold through a New York broker?

A. Yes, sir; I think it was. Nearly all of that was sold through a New York broker.

×*Q.* Sold in New York?

A. Not all in New York. That question might again lead to possibly some misunderstanding. It was sold by a broker in New York, partly to a house in New York and partly to a house in Boston.

×*Q.* The sales were made, that is the contract of sale was made, in New York, was it not? That is, the transaction was made, in New York although the delivery of it was in Boston; a part of it?

A. No; in several cases we corresponded directly to the house in Boston.

×*Q.* You mean the broker did?

A. We did, ourselves, and the broker also corresponded for us, with the Boston house, and it was done by letter in some cases.

By Mr. Lewis:

×*Q.* From your office in Philadelphia?

A. Yes, sir; and through our broker's office.

By Mr. Parkin:

×*Q.* When you sell sound wheat, as commission merchants, do you have any correspondence direct with the purchaser?

A. None, if he is where we are.

×*Q.* Do you see him at all?

A. Sometimes only. Sometimes it is sold through the broker.

×*Q.* Well, I mean where the broker is employed, do you have any communication direct with the purchaser?

A. Not always. Usually the broker issues a little order for it.

×*Q.* In making a sale, do you simply give an order to the broker to sell so much at a certain price, or do you tell him to find out what he can get for it?

A. We do it both ways

× *Q.* Then if you do it in the latter form, that is, for him to find what he can get for it, I suppose he communicates with you as to the price which is proper and negotiations are carried through direct to fix upon the price?

A. That all depends upon the condition of the cargo and circumstances. Some days we would say to the broker, "You can sell for us, within half an hour, or an hour, so much wheat, at a certain price." Another day, with the market fluctuating a cent or two within an hour, we would naturally tell him to get us any bid he could.

× *Q.* Do you know of any sale of damaged wheat being made in Philadelphia, except this *Liscard* cargo, which has come under your personal observation?

A. I don't recollect any. Some years ago we had a vessel that had a slight damage of some kind going down the river, and a portion of her cargo was discharged. I think to the extent of 100 or 200 bushels. I think that is the only case where we have had a part of cargo damaged leaving port.

× *Q.* That is the only case in your experience in which the wheat has been damaged?

A. Yes, sir.

By Mr. Lewis:

× *Q.* I understood you to say that some of these sales were effected from your own office, of this damaged cargo?

A. Some were; that is true.

× *Q.* Did you give the broker absolute authority to effect the sale without your having anything to do with the matter at all?

A. Never. We place them all in the hands of the broker; he is to notify us of any offers.

× *Q.* In reference to the sale of the *Liscard* wheat, the broker acted as a mere agent?

A. Yes, sir.

× *Q.* What I mean is, the broker acted as a seller to some extent for you in the sale of the wheat?

A. Yes, sir; and submitted to us what bids he got.

×*Q.* But you did not authorize the broker to have entire charge of the sale?

A. Oh, never.

×*Q.* And the sale then you conducted yourself, as I understand it, and employed a broker to solicit for you?

A. That was it.

×*Q.* Did that impose upon you more labor than the sale of wheat coming from the West, that was sound?

A. Infinitely more; different people to deal with and different business.

By THE COMMISSIONER:

×*Q.* As I understand, Mr. Johnson, the commission on the sale of sound wheat is from one-half a cent to one cent a bushel?

A. Yes, sir; that is the custom of the floor of the Exchange here.

×*Q.* Not a percentage on the value?

A. No, sir; usually not. It was in former years.

×*Q.* But on damaged wheat, so far as you know, the amount of percentage is charged on the amount realized?

A. Yes, sir.

By MR. PARKIN:

×*Q.* I think you said that this was the only case of damaged wheat that had come under your notice?

A. Yes, sir.

×*Q.* That is, that came under your observation?

A. Yes, sir; we have had nothing to do with other cargoes that were damaged.

×*Q.* So you have no knowledge as to what is usually charged for selling damaged cargo?

A. Only from the information we received from experts when we came to put the amount in the adjustment. We were informed that it was customary to charge 2½ per cent.

×*Q.* On wheat?

A. Yes, sir.

×*Q.* Where did you get that information from?

A. From adjusters and merchants and from Peter Wright & Sons. They informed us that if they had the selling of it, they would have charged it.

×*Q.* Do you mean to say that there are merchants in this city that deal in damaged cargoes?

A. Not as a rule.

×*Q.* Do you mean to say that you know of any instance of damaged wheat being sold here?

A. Not damaged cargoes. I know of small lots sold here, but not damaged cargoes.

×*Q.* Do you sell damaged wheat here at all, even in small lots?

A. Occasionally a boat load comes in from Delaware or some neighboring States, which may have been damaged and that is sold in the usual way.

×*Q.* What do you mean by the usual way?

A. On the floor of the Exchange by a sample drawn from that. An inspector is sent on the boats to draw from it.

×*Q.* Have you had such a sale in your experience?

A. Yes, sir; we have had small boat loads of damaged grain in the harbor.

×*Q.* And what commission did you charge in that case?

A. In that case I don't know whether we bought or sold.

×*Q.* You have no knowledge about it?

A. I cannot just remember.

×*Q.* In small lots?

A. Yes, sir.

×*Q.* Do you know what the commission is in these small lots?

A. No, sir.

×*Q.* You don't know what is the usual commission in such cases?

A. I don't.

By Mr. Lewis:

×*Q.* I understood you to say that your commission of 2½ per cent., which you charged in this case, was, in your opinion, reasonable and proper, in view of the labor you had in that particular case?

A. I did.

×*Q.* I understood you to say that before you put that charge in, you inquired among such other people as you could reach in the city here, and was informed that that was the customary and usual rate. Is that so?

A. I did.

By Mr. Parkin:

×*Q.* What was the extra labor in selling this damaged wheat, Mr. Johnson, which you have referred to, instead of sound wheat?

A. I pretty well described it a few minutes ago—the difference between the two systems.

×*Q.* I am asking as to this particular instance?

A. It required, in the first place, trips to New York and Boston; several entire days given to it alone. The sending of an inspector to examine and separate that grain for this purpose alone. The visitation of certain offices to find buyers, which we should not have done if it had been a sound article. Then, instead of selling it as one quality of wheat as we bought it shipped on the vessel, we sold it in many different lots and to many different buyers. These are some of the points.

×*Q.* Do you mean that you made trips to New York and Boston for this cargo?

A. Yes, sir.

×*Q.* For this special *Liscard* cargo?

A. Especially for the *Liscard* case in disposing of the cargo.

×*Q.* And especially for the selling of it?

A. The trip to Boston was for superintending and selling it.

×*Q.* And the trip to New York was for what?

A. That was consulting with the brokers there as to the selling of it. I was in New York twice.

× *Q.* What were the dates, if you remember them?

A. I cannot tell; I cannot remember the month either; it was within a month after we received the cargo.

× *Q.* After the voyage had been broken up?

A. Yes, sir.

× *Q.* You said also that you employed inspectors to examine and separate the grain?

A. Yes, sir.

× *Q.* I suppose Annan & Co. were the people you referred to?

A. Yes, sir; a man from their employ went to Boston for that purpose.

By Mr. Lewis:

× *Q.* Please state whether you had to attend to the division of the damaged cargo into quite a number of lots, according to the extent to which it was damaged?

A. One lighter was divided into three lots and three different prices.

× *Q.* Did you do that?

A. We did.

× *Q.* That was done, I presume, because certain purchasers would take wheat damaged to a certain extent and others to a greater or less extent. Is that true?

A. In some cases; but the same purchasers wanted value for what they paid. They paid accordingly.

× *Q.* Then you couldn't sell this damaged wheat by a single lot, but had to have samples from its various lots?

A. We had many samples.

× *Q.* What was the very worst used for as far as you know?

A. I don't. We sold the worst of it to a New York firm. What they did with it I don't know.

× *Q.* Was it used for different purposes according to the extent of the damage?

A. Oh, yes, sir.

×*Q.* Please state whether or not it was necessary to find purchasers who wanted the damaged wheat the grade that you had for sale?

A. Certainly; for totally different purposes.

×*Q.* And these absolutely different purposes would depend upon the extent to which it was damaged?

A. No; they can use a better wheat for the same purpose.

×*Q.* What I mean is, that, for instance, the fertilizer did not buy the most sound?

A. Yes, sir.

×*Q.* And the confectioner did not buy the worst?

A. No, sir.

×*Q.* Did this difference in the nature of the business which would be required to use these various grades of damaged wheat necessarily or bring you into contact with a great many different trades other than the mere flour trade?

A. Yes, sir; many different trades, and it required much more labor than selling ordinary sound wheat.

By Mr. Parkin:

×*Q.* You don't mean to say that you were brought into contract with the chicken feeder in connection with the selling of this *Liscard* wheat?

A. Yes, sir; some of that we were. I believe we were with starch makers.

×*Q.* Were you brought in contact with them individually?

A. No.

×*Q.* Did you sell it to these other people?

A. Chicken feed people?

×*Q.* Starch factories or brewers?

A. No, I didn't. That was through the broker.

×*Q.* Do you mean that the broker sold to these other people?

A. Yes, sir.

×*Q.* He hunted these customers for you?

A. Yes, sir.

×*Q.* The larger part was sold to a merchant who deals in damaged wheat in New York?

A. Yes, sir.

×*Q.* In fact, all of it nearly was sold to him?

A. I don't know what he deals in.

×*Q.* He deals in wheat?

A. Yes, sir; a large portion of it was sold to a man in New York, who deals in wheat.

×*Q.* How much of it was sold to a brewer?

A. I am unable to tell you.

×*Q.* Do you know the brewer's name?

A. No.

×*Q.* There was a firm of McIntyre & Wardwell, wasn't there?

A. Yes, sir.

×*Q.* What is their business?

A. They are shippers.

×*Q.* And Pfarius is a merchant?

A. And a broker, too, I think.

×*Q.* You said you sold sound wheat by samples sometimes?

A. Yes, sir.

×*Q.* By exhibition of samples?

A. Yes, sir.

×*Q.* In what quantities do you sell sound wheat?

A. You must understand that we buy much more than we sell. Being exporters, we buy very much more. Our trade is more in buying than in selling. We sell in comparatively small quantities. In buying, we buy whole cargoes, even by sample.

×*Q.* In selling you sell in small quantities?

A. Yes, sir.

×*Q.* What do you mean by small quantities?

A. About 5,000 or 10,000 bushels.

×*Q.* That is where you sell by samples?

A. Yes, sir.

(Messrs. Lewis & Tilton offer the adjustments referred to by Mr. Curtin in evidence, as having been made in his office. The Commissioner rules that, as adjustments, these are not evidence. That, as memoranda to support Mr. Curtin's testimony as to the amount which has been charged and paid for the sale of damaged cargoes, to that extent only are they admitted.)

MONDAY, March 25, 1894, 2 p. m.

Present.—EDWARD F. PUGH, ESQ., Commissioner.
MESSRS. TILTON & LEWIS, for libellants.
MR. PARKHAM, for respondents.

ARTHUR W. HOWELL, having been duly affirmed, was examined as a witness for respondents as follows :

By MR. PARKHAM :

Q. What is your business ?

A. I am manager of the grain and shipping department of Brockie & Welsh.

Q. How long have you been in the grain business ?

A. I have been in the grain business for a number of years. In fact, since 1869.

Q. You have been in the habit of buying and selling wheat for export ?

A. Yes, sir.

Q. Are you familiar with the customs of the trade here in Philadelphia ?

A. Yes, sir.

Q. And with the usual rates of commission which are charged for buying and selling wheat ?

A. Yes, sir.

Q. What is the usual rate of commission for buying and selling sound wheat ?

A. A half cent a bushel.

Q. Are you qualified, from your experience in the grain business, to give an opinion as to what would be a reasonable commission for selling damaged wheat?

(Objected to. Objection overruled.)

A. Yes, sir.

By MR. LEWIS:

Q. Please state what cargoes of damaged grain you have sold?

A. I do not know that I can name any particular damaged grain that I have sold. I can only speak from my general experience in the business and from inquiries from others in the trade.

Q. Then you have sold no damaged grain yourself at all? Is that so?

A. No. I cannot remember now any actually damaged grain that I sold.

(Competency of witness objected to.)

By THE COMMISSIONER:

Q. Do you know of the sale of damaged grain? Do you know of such sales being made?

A. Here?

Q. Anywhere?

A. Yes, sir.

Q. Do you know what rate of commission it is customary to charge for them?

A. I know from hearsay; from what I have gathered from others.

By MR. LEWIS:

Q. When have you gathered the information that you speak of?

A. I couldn't say exactly when. Within the last few weeks, perhaps.

Q. That is, you mean you simply inquired around from people what they charge?

A. Yes, sir.

(Objection to the competency of the witness renewed. Objection overruled. Exception for libellant.)

By Mr. Lewis:

Q. What did I understand you to say your position was?

A. Manager of the grain and shipping department of Brockie & Welsh.

Q. They are not in that business now, are they?

A. They are, in connection with their insurance business. They succeeded the business of William Brockie, and I was with William Brockie for over twenty years: and I went with them.

Q. Are you still with Brockie & Welsh?

A. Yes, sir.

Q. How much wheat do they buy and sell? Do they buy any?

A. Yes, sir.

Q. For other people?

A. For other people. We buy on orders.

Q. Do you, yourself, ever buy any out West?

A. No, sir.

Q. Never bought any wheat out West at all?

A. No, sir. It is not our business.

Q. What you mean is, you buy here, practically, warehouse receipts?

A. Yes, sir; we buy the grain here.

Q. Buy simply the warehouse receipts?

A. We buy the grain and ship it.

Q. You never bought a cargo of wheat in the West, or any grain in the West?

A. No, sir; we do not buy grain in the West. We buy the actual grain here.

Q. You practically act as exporting agent for purchasers abroad?

A. We act as merchants. We act as agents. We buy the grain and ship it.

Q. Do you buy the grain or certificates for the grain?

A. We buy the grain. Of course we get the certificates.

Q. When you buy the grain what do you get for it?

A. We get the warehouse certificates.

Q. You buy the grain in the warehouse?

A. Yes sir; in the elevators.

Q. And after it is in the warehouse?

A. Yes, sir.

Q. You do not buy it out West at all, or handle it as grain?

A. Certainly we handle it as grain. I do not quite understand your question.

Q. Do you buy it out West?

A. No, sir; we buy it here.

Q. Or do you simply handle it by warehouse certificates?

A. We buy it from receivers here.

Q. What you mean is you buy a warehouse certificate?

A. For instance, we buy 20,000 bushels of wheat to-day for delivery, maybe, to-morrow, or next day or a week hence for shipment on a certain steamer.

Q. What do you get for it?

A. We get warehouse certificates for it on the exporting elevator—deliver it to the elevator and they deliver the grain to the steamer.

Q. You physically do not handle the grain; you handle the certificates? Is not that so?

A. Yes, sir. We do not go and put our hands in the grain.

Q. You do not physically handle the grain?

A. No, sir.

(Counsel for libellant object to the further examination of this witness upon the subject of the usual or proper commission for selling damaged grain, because his testimony shows that he has never had any experience in the sale of such grain, and has no knowledge on the sub-

ject excepting what he has gained by inquiry from other people within the last three weeks, and presumably for the purpose of testifying in this case.)

(Objection overruled.)

By Mr. Parkin:

Q. What, in your opinion, would be a proper commission for selling a cargo of damaged wheat by a merchant, where a broker had been employed by him to assist him in the sale?

(Objected to unless the witness is familiar with the facts of the present case, and because the question as asked is immaterial to the present case. Objection overruled.)

A. From a half to one cent a bushel.

Q. In the case of the *Liscard*, the cargo consisted of about 80,000 bushels, and it sold in its damaged condition on an average from 10 to 15 per cent. below the market price of sound wheat of the same grade, and a broker was employed in that case to assist the merchant in making the sale. What would you consider a reasonable commission for the merchant for making such sale?

(Objected to for the reasons before stated.)

A. I should think a cent a bushel would be a full recompense for that business.

Q. Would you consider that 2½ per cent. on the proceeds of the sale, which would amount, according to my recollection, to from two to two and a half cents a bushel, would be an excessive charge?

A. I should think so.

Q. Have you made inquiries among the merchants in Philadelphia as to what would be a fair and reasonable commission for selling damaged wheat in their opinion?

(Objected to. Objection sustained.)

Q. Do you know of instances where damaged wheat has been sold?

A. I cannot name any specified lots, but only in a

general way; a half to one cent a bushel is the charge on selling damaged grain. It would be impossible to give any specified sales.

Q. But you have heard of cases where sales have been made and where that has been the commission charged?

A. Yes, sir.

Q. You have learned that in your inquiries among merchants here?

A. Yes, sir.

CROSS-EXAMINATION.

By MR. LEWIS:

×*Q.* Have you read about such cases also?

A. No, sir; I do not remember reading about any cases.

×*Q.* You are Mr. Brockie's brother-in-law, are you not?

A. I am the brother-in-law of Mr. William Brockie, deceased; yes, sir.

×*Q.* As I understand it, you cannot give a single instance of any vessel that you know of in your own knowledge whose cargo of damaged wheat has been sold?

A. No, sir; I cannot.

×*Q.* Who first asked you to go around and make these inquiries which you have been making for the past two or three weeks?

A. It has been spoken of in our office about the usual commissions and so on, and I said I would try to get my opinion verified; what I said was right. I told them that I thought the rates were about a half to a cent a bushel.

×*Q.* Then did Mr. Brockie, Jr., ask you to go around and make those inquiries?

A. Yes, sir; to get my opinion verified.

×*Q.* What person did you ask?

A. I asked the various grain merchants on 'Change.

×*Q.* Which persons did you ask? Give me their names, please?

A. I think I asked Hancock & Co. I cannot really affirm to whom I exactly asked, but I think Hancock & Co., and String, Brazer & Co. I am not sure about that. It is very hard for me to say now exactly.

×*Q.* You have mentioned Hancock & Co. Have they ever shipped a cargo of grain that you know of?

A. No, sir.

×*Q.* Never have?

A. No, sir.

×*Q.* Never one single cargo?

A. No, sir.

×*Q.* What was the other firm you mentioned?

A. Those firms that I have mentioned are not shippers.

×*Q.* What was the other firm that you mentioned?

A. String, Brazer & Co. I am not sure about them.

×*Q.* You are not certain you asked them?

A. No, sir.

×*Q.* You know, as a matter of fact, whether you asked them or not; they never shipped a cargo, either.

A. No; I know that the firms I asked are not shippers.

×*Q.* What are they?

A. Receivers. They receive grain from the West.

×*Q.* People on the floor of the Exchange who receive grain?

A. Who receive grain from the West, and who would be the most likely people to receive damaged grain in Philadelphia.

×*Q.* Have any of them sold damaged grain that you know of?

A. Yes, sir; they have.

×*Q.* Which ones?

A. I could not specify. I suppose they have all had more or less experience. Anybody in the western trade receiving grain must necessarily have now and then a lot of damaged grain.

×*Q.* You mean damaged grain on cars?

A. Yes, sir.

×*Q.* That is, 500 or 600 or 1,000 bushels—is that it?

A. Yes, sir.

×*Q.* Damaged grain that has come from the West, and gotten injured by fire and water—is that so?

A. Yes, sir.

×*Q.* You are not, then, testifying, and they were not testifying, to the handling of a cargo of grain injured by sea water, were they?

A. That would be very hard to find.

By Mr. Parkin:

×*Q.* These people of whom you inquired are grain merchants, in this city, are they?

A. Yes, sir.

×*Q.* Large dealers in grain?

A. Yes, sir.

By Mr. Tilton:

×*Q.* As you have had no experience in selling damaged grain, and cannot mention a single cargo that you ever had anything to do with, your testimony here to-day must be based necessarily on what you have learned by those inquiries recently made? Is not that so?

A. From that, and from my general knowledge of the business, and knowing how it is handled.

×*Q.* But you have said that you have no knowledge derived from experience of your own in handling damaged grain? Is that true?

A. I never handled damaged grain.

×*Q.* Then, so far as relates to the damaged grain, your testimony to-day is based on what you have recently been told by these other people?

A. Yes, sir.

By Mr. Lewis:

×*Q.* And you cannot state one single instance these other people have had where they have sold damaged grain? Is that so?

A. No; I did not go into the particulars.

×*Q.* Therefore, you cannot tell what amount of labor they had in effecting that sale, can you?

A. No, sir.

×*Q.* You know, as matters of fact, that they never shipped a grain of corn, do you not?

A. Yes, sir; as far as I know I don't think they did.

×*Q.* Where they did sell damaged grain, as I understand you, it was a case in which a carload happened to be injured, or a portion of a carload, after it arrived here, or while it was coming here?

A. Yes, sir.

×*Q.* And upon inspection, the cargo, or part of the cargo, had been sold by these people?

A. Yes, sir.

×*Q.* You did not narrate to them, did you, the facts attending the loss of the *Liscard* cargo of grain?

A. No, sir; I made no reference to it.

Adjourned.

Libellant's Exhibit 100. E. F. P. Comr.

2678 7 16 91 Da. 176

GENERAL AVERAGE BILL.

PHILADELPHIA, July 6th, 1891.

MESSRS. LAWRENCE JOHNSON & CO.,

To General Average & Special Charges

PER. BR. S. S. "LISCARD," DR.

Peter Wright & Sons, Consignees

For proportion of General Average on Cargo of Wheat ex. S. S. "Liscard" As per statement of Messrs. Johnson & Higgins, dated May 29th, 1891, ...	$4,243 64
Special Charges on cargo, less charges in adjustment made by Messrs. Lawrence Johnson & Co., ...	11,930 96
Interest on $16,174.60 from Sept. 1st, '91, to Oct. 29th, '92, say 1 year, 1 month and 28 days, at 5% per annum, . . .	938 94
	$17,113 54

E. & O. E.

Libts Exhibit 101. E. F. P. Comr.

MEMO. OF LAWRENCE JOHNSON & CO.'S ACCOUNT WITH S. S. "LISCARD."

Amount agreed to be allowed Messrs. Lawrence Johnson & Co., per negotiations Oct. 26th, '92, ...	$1,450 00
Interest on same from Sept. 1st, '91, to Oct. 29th, '92, say 1 year, 1 month and 28 days, at 5% per an., ...	84 17
	$1,534 17

PHILADELPHIA, October 27th, 1892.

Libts Exhibit 102. E. F. P. Comr.

As 23 2 16 92 4L. 130

PER S. S. _____

PETER WRIGHT & SONS,
PHILADELPHIA, . . 307 Walnut Street,
NEW YORK, ... 6 Bowling Green.
Freighting Department Represented in London by W. W. YOUNG, Nos. 4, 5, & 6 Great St Helens.

Cable Address, { *Wrights, Philadelphia.* / *Wrights, New York.*

FREIGHTING DEPARTMENT.

PHILADELPHIA, October 29th, 1892.

In consideration of the payment to us by Messrs Lawrence Johnson and Company of the sum of Fifteen thousand five hundred and seventy-nine dollars and thirty-seven cents ($15,579.37), being in full compromise and settlement of the cargo's proportion of special and general average charges in the case of the Steamer "Liscard," arising upon her voyage from New York in December, 1890, we hereby agree to protect the said Lawrence Johnson & Company from all claims and demands of every nature and kind on the part of said steamer, or of all other parties having claims arising out of services rendered to said cargo or steamer on said voyage. And the said Lawrence Johnson & Company hereby agree to release and protect said steamer and owners from any and all bills and claims by cargo against said steamer in the nature of average charges incurred by them.

PETER WRIGHT & SONS, F. L. N.
LAWRENCE JOHNSON & CO.

Libts Exhibit 103. E. F. P. Comr.

As 23 2 16 92 4L.

Per S. S. _____

PETER WRIGHT & SONS,
Philadelphia, . . 307 Walnut Street,
New York, ... 6 Bowling Green.
Freighting Department Represented in London by W. W. Young, Nos. 4, 5, & 6 Great St. Helens.

Cable { *Wrights, Philadelphia.*
Address, { *Wrights, New York.*

Freighting Department.

Philadelphia, October 29th, 1892.

Received, of Lawrence Johnson and Company, Agents for the Owners of the cargo of wheat lately laden on board of the Steamship "Liscard," the sum of Fifteen thousand five hundred and seventy-nine dollars and thirty-seven cents ($15,579.37), which is accepted by the undersigned as Agents for the owners of the said Steamship in full settlement and release of all claims and demands upon the said cargo for general average, special charges or otherwise.

PETER WRIGHT & SONS, F. L. N.
Agents for British Steamer "Liscard" and Owners.

Libts Exhibit 114. E. F. P. Comr.

The Underwriters on Cargo are willing now as they always have been that the payment of Thirty six hundred dollars ($3600) freight on the damaged cargo of the Steamer "Liscard" by Lawrence Johnson & Co. and the acceptance and sale of said cargo by them shall be without prejudice to any of the rights or claims the shippers or owners of the cargo may have against the insurers of said cargo, and "shall not be considered a waiver or an acceptance of an abandonment" and shall be without prejudice to any defence that the insurers of the cargo may have under their contract of insurance.

In any claim, excepting for general average that may be established by the shipper or owner of the cargo against the insurers, the said sum of $3600 shall be a recoverable item. This provision however, shall be without prejudice to the right of the cargo owner to demand an allowance for said $3600 in General Average.

Philadelphia Feby. 20th, 1891.

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, Limited.
MATHER & Co.
Agents
THE LONDON ASSURANCE
BROCKIE & WELSH
Agents
THE MANNHEIM INS. CO.
BARKER & McCALL
Agts
INTERNATIONAL MAR. INS. CO. Lim
JOHNSON & HIGGINS *Atty*
WESTERN ASSURANCE CO.
JOHNSON & HIGGINS *Agts.*

Libts Exhibit 115 E. F. P., Comr.

In re STR. "LISCARD".

Received Philadelphia, March 2d, 1891, of Lawrence Johnson and Company Agents, of cargo owners, Thirty six hundred dollars, in full settlement of all claims of the said Steamer "Liscard" her Master or owners for freight upon the entire cargo of wheat surrendered at Boston unto Lawrence Johnson & Company, Agents, Quantity unknown.

$3600.00

PETER WRIGHT & SONS, F. L. N.
$3600.00/100
Agents Br. Steamer Liscard and owners.

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Libts Exhibit 116 E. F. P., Comr.

Philadelphia, March 2d. 1891.

In re Str. "Liscard".

Received of Lawrence Johnson & Company, Agents of cargo owners their check for the sum of Twelve thousand dollars to the joint order of Peter Wright & Sons and Lawrence Johnson & Company;—said check to be deposited tomorrow (banking hours having closed to day) in the Trust Company of North America, said deposit to be deemed as of this date. The said sum to be withdrawn upon the joint checks of Lawrence Johnson & Company and ourselves under the terms of an agreement made at Boston February 27th. 1891 *in re* Str. "Liscard" and her cargo of wheat. Check and deposit books to be held by Lawrence Johnson & Company.
$12,000.

PETER WRIGHT & SONS, F. L. N.
$12,000.00/100
Agents Br. Str. Liscard and owners.

Libts Exhibit, 117 E. F. P., Comr.

Know All Men by these Presents, That we, Lawrence Johnson & Company of Philadelphia, are held and firmly bound unto Arthur Holland & Company, owners and (or) F. Campbell, Master of the British Steamship "Liscard" in the just sum of fifteen thousand dollars ($15,000) lawful money of the United States of America, to be paid to the said owners or Master, their certain attorneys, executors, administrators or assigns, or either of them, for which payment well and truly to be made we do bind ourselves, our executors, administrators and assigns, firmly by these presents, sealed with our seal and dated the second day of March A. D. 1891.

WHEREAS, by agreement dated, February 27th. 1891 between the said Owners and Master of British Steamship "Liscard" and Peter Wright & Sons, their agents, of the one part and said Lawrence Johnson & Company, Philadelphia, Agents for Owners of cargo on the other part, it was *inter alia* agreed that the said Lawrence Johnson & Company will give the Master and Owners of said Steamship "Liscard" bond in the sum of fifteen thousand dollars ($15,000) for the payment of all proper and legal special charges on said cargo paid or incurred on account thereof by said Steamship "Liscard", her Owners or Agents.

NOW THE CONDITION OF THIS OBLIGATION is such that if the said obligors shall well and truly pay or cause to be paid all proper and legal special charges paid or incurred on account of said cargo of the said Steamship "Liscard" by her Master Owners or Agents then this obligation to be void otherwise to be and remain in full force and virtue.

IN WITNESS WHEREOF the obligors above named have hereto set their hands and seals at the City of Philadelphia this 2d day of March 1891.

Signed, sealed and delivered in the presence of

CURTIS TILTON
J. RODMAN PAUL

LAWRENCE JOHNSON, per R. W. J. [SEAL]

R. WINDER JOHNSON, [SEAL]

ANTONIO SANS, per R. W. J. J. D. G. [SEAL]

LAWRENCE JOHNSON & CO. [SEAL]

[Across the face is written]
Cancelled
PETER WRIGHT & SONS, F. L. N.
Oct. 29/92.

Exhibit 200. E. F. P., Comr.

MEMORANDA SALES OF WHEAT EX "LISCARD."

March 6th, 1891. Sold "LORENA" lot to be delivered to the Elevator, delivery to take place in a week. Actual delivery of Wheat was completed March 13th.

March 6th— Sold 16,000 bushels from Elevator lot of Wheat, delivery to be made in about a week.

March 6th— Sold about 18,000 bushels from Elevator lot, delivery in Elevator but free storage guaranteed until March 10th inclusive.

March 6th— Sold about 8,000 bushels Elevator lot, delivery in about a week.

March 7th— Sold about 8,400 bushels free storage guaranteed until March 10th inclusive.

March 9th— Sold "BRIAR" lot.

March 9th— Sold Lighter No. 2

March 11th— Sold about 16,000 bushels to be delivered F. O. B. Vessel from Elevator. Actually delivered from Elevator March 12th.

March 12th— Sold Lighters No. 4 and "CARLTON." "CARLTON" did not arrive in New York until March 25th.

"LISCARD."

Exhibit 201. E. F. P., Com'r.

STATEMENT SALE WHEAT BILL OF LADING No. 1.

Certificate	Bushels	Price	Proceeds	Remarks			
7723 P.	3,098.20	98 c.	$3,036.36	Part of cheque	E. Pfarius	3/14	$28,463.26
7716 P.	8,613.40	"	8,441.39	" "	McIntyre & Wardwell	3/11	18,000.00
						3/14	139.31
7723 P.	7,778.30	"	7,622.93	" "	E. Pfarius	3/14	28,463.26
7722 T.	4,450.10	96¼	4,283 29	" "	do.		
7747 T.	3,729.10	"	3,589.32	" "	do.	3/17	16,333.63
7751 T.	1,417.10	"	1,364.02	" "	do.		
					Brooklyn Grain W. H. C.	3/13	3,000.00
Briar P.	988.42	15	148.30	" "	R. H. Laimbert	3/26	515.41
					Brooklyn Grain W. H. C.	3/13	3,000.00
Lighter No. 2 P.	2,639.06	42 4/8	1,119.19	" "	R. H. Laimbert	3/26	515.41

MEMORANDUM OF CASH RECEIVED SALE "LISCARD" CARGO.

March 11 '91 from McIntyre & Wardwell . . . . . $18,000.00.
" 12 " do. . . . . 8,232.00.
" 13 " Brooklyn Grain W. H. C. . . . . 3,000,00.
" 14 " E. Pfarius . . . . . 28,463.26.
" " " McIntyre & Wardwell . . . . . 139.31.
" 17 " E. Pfarius . . . . . 16,333,63.
" 18 " do. . . . . 1,084.68.
" 26 " R. H. Laimbert . . . . . 515.41.
" 28 " Grand Junction Elevator Co., 1270 lbs. screenings at $6.50 per 2000 lbs. 4.13.

Statement Sale Wheat Bill of Lading No. 3.

Certificate	Bushels	Price	Proceeds	Remarks				
7717 P.	8,763.10	98 c.	$8,587.90	Part of cheques		McIntyre & W.	3/11 3/14	$18,000.00 139.31
7739 T.	1,649.30	96¼	1,587.64	"	"	E. Pfarius	3/17	16,333.63
7738 T.	5,724	"	5,509.35	"	"	do.	"	16,333.63
7723 P.	3,754	98	3,678.92	"	"	do.	3/14	28,463.26
7716 P.	1,180	"	1,156.40	"	"	McIntyre & W.	3/11 3/14	18,000.00 139.31
7736 T.	1,049.10	"	1,028.18	"	"	E. Pfarius	3/14	28,463.26
Lorena P.	7,665.20	80	6,132.26	"	"	do.	3/14 3/18	28,463.26 1,084.68
						Brooklyn Grain W. H.	3/13	3,000.00
Lighter No. 2 P.	2,942.02	42408	1,247.66	"	"	R. H. Laimbert	3/26	515.41

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Memorandum

Dates of Sales

March 6 "Lorena."
" 6 Elevator about 16,000 Bushels.
" " do. " 18,000 do.
" 6 do. " 8,000 do.
" 7 do. " 8,400 do.
" 9 Lighter No. 2, 2 Lots.
" 9 "Briar."
" 12 Lighter No. 4.
" 12 "Carlton."
" 11 Elevator. 16,000 Bushels.

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Exhibit 515. E. F. P., Comr.

Copy.

In Re cargo S. S. "LISCARD."

PHILADELPHIA, April 29th, 1891.

Dear Sirs:—

We submit herewith proof of loss and interest under your certificate of insurance No. issued at Philadelphia December 1890 on Wheat on board the S. S. "LISCARD." The proofs are as follows:—

1—Copy of report of surveyors on damaged cargo made at the instance of the Master.

2—Copy of survey on cargo made by the inspector for cargo owners.

3—Copy of Bill of Lading

4—Copy of Invoice

5—Copy of Account Sales of Cargo

6—Certified copy of Protest.

7—Affidavit that said copies are true copies of the original.

8—Statement of assured claim against the underwriters.

9—The original of these papers are also submitted herewith to your Philadelphia Agents for the purposes of authentication.

10—The sum due the assured under your certificate is set forth in the statement submitted herewith. This sum may be modified upon final settlement of all charges and adjustment of the average account. Please let us know if you desire any addition to these proofs. You will note that your liability is not only established by the collision mentioned in the protest occuring after the voyage began, but by the further fact which appears from the surveyor's report, that the cargo would have been a total loss if the ship had gone forward with it in its damaged condition to Lisbon.

Very truly yours,

LAWRENCE JOHNSON & CO.,

Agents for the Assured.

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Copy.

PHILADELPHIA, April 29th, 1891.

In Re S. S. "LISCARD."

Dear Sirs :—

If you desire to see the original papers of which copies are handed to you in the proofs of loss and interest submitted herewith, we will afford you every opportunity to examine them for the purpose of the authentication of the proofs. We furnish you an affidavit of the correctness of the copies. There are five underwriters and of course only one set of original papers.

Very truly yours,

LAWRENCE JOHNSON & CO.,
Agents of Cargo Owners.

Exhibit 516. E. F. P., Comr.

Copy.

SEPTEMBER 15th, 1891.

THE LONDON ASSURANCE CO.,
Messrs. Brockie & Welsh, *Agents*,
No. 218 Walnut Street, Philadelphia.

Dear Sirs :—

Regarding the "LISCARD" Case, we must ask you to please return us without further delay the copy of the average adjustment, which we handed to you over two months ago.

At the time we gave it to you, we requested you to please return it promptly and we have since called several times at your Office, but without result.

We must now request you to please return the document to us immediately.

Yours truly,

LAWRENCE JOHNSON & CO.

Exhibit 517. E. F. P. Comr.

Copy.

NOVEMBER 14th, 1891

THE LONDON ASSURANCE COMPANY,
Messrs. Brockie & Welsh, *Agents*,
Philadelphia. S. S. "LISCARD."

Dear Sirs :—

Under date of April 29th, 1891, we submitted to you proofs of loss together with a statement of the sum due from your Company under its policy. As certain of the bills then included in our claim were to be apportioned by the average adjusters and a part charged to the owners of the Steamer, we called your attention to the fact that the adjustment when concluded would modify somewhat the amount of our claim. A copy of the adjustment was served upon you as soon as it was completed, now months ago, and we hand you herewith a corrected statement based upon the adjustment. The adjusters have charged the cargo and owners with $1750.04 due ourselves for services. As these services should be paid by yourselves under the sue and labor liability of your policy, we have of course included this sum in the statement of claim now submitted.

Owing to the request of your own agents here or those of the underwriters interested, we have delayed proceeding with our suits for several months and we would now request a definite proposition of settlement, or an expression of your intentions respecting the further contest of the claims.

Very truly yours,
LAWRENCE JOHNSON & CO.
Agents for Cargo Owners

Above also written to
THE MANNHEIM INSURANCE CO. of Mannheim, Germany,
Mr. HUGO MENZEL
Messrs. Barker & McCall, *Agents*, Philadelphia.

And afterwards, the cause being heard on the said report of the Commissioner aforesaid, and the exceptions on behalf of both parties thereto, and argument being had thereon, the opinion of the Court is on the twenty-sixth day of June, A. D. 1894, filed in the words and figures following, to wit:

"Companhia de Moagens do Barreiro *vs.* "The London Assurance."	In Admiralty, No. 8. Of 1892.
Same *vs.* The Manheim Insurance Company of Manheim	In Admiralty, No. 9. Of 1892.

I have examined the several exceptions in the light of the testimony, the comments of counsel, and the Commissioner's reasons for his action, and am satisfied they should be dismissed. The report shows a very careful and intelligent consideration of the several questions raised, and I confirm it on the reasons therein stated for the conclusions reached. The controversy is substantially about matters of fact. Even that part of it which related to the method of estimating the loss on cargo involves no debatable question of law; the rules governing the subject are well settled. The Commissioner's duty in this respect was to ascertain the facts, and apply these rules to them. I think his ascertainment is justified by the evidence, and that his application of the rules is correct.

And afterwards, to wit, on the seventh day of December, A. D. 1894, decree being entered, is in the words and figures following to wit:

Companhia de Moagens do Barreiro *vs.* The London Assurance	U. S. D. C. E. D. of Pa. No. 8. Of 1892.

And now, to wit: this seventh day of December, A. D. 1894, this cause having been fully heard upon pleadings and proofs, and the argument of the advocates of the respective parties, and due deliberation being had, and the Commissioner to assess the damages having filed his report, and the exceptions thereto having been considered by the Court, it is ordered, adjudged and decreed that the said exceptions be dismissed and that the libellant have and recover of the respondent, "The London Assurance," the sum of eleven thousand two hundred and sixty-nine dollars and twenty-five cents ($11,269.25), for their damages, together with their costs to be taxed. Interest hereon to run from November 30, 1894.

And afterwards, to wit: on the fourteenth day of December, A. D. 1894, Wm. W. MacFarland, William Parkin, E. Hunn Hanson, and Henry S. Cattell, Esqs., Proctors of said Court, come into Court and present the petition of the respondent for leave to appeal from the decree of the Court in this cause to the next United States Circuit Court of Appeals for the Third Circuit, together with an assignment of errors, and the same being filed is in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

COMPANHIA DE MOAGENS DO BARREIRO	In Admiralty.
vs.	No. 8. Of 1892.
THE LONDON ASSURANCE.	

To the Honorable William Butler, Judge of the said Court:

The petition of the respondent, The London Assurance, respectfully represents:

1. That on the eighth day of February, 1892, Companhia de Moagens do Barreiro filed a libel in a cause of contract, civil and maritime, against The London Assurance, that

process duly issued upon said libel and that there was acceptance of service of the citation and an answer to the libel filed.

2. That afterward, on the twelfth day of May, 1893, an interlocutory decree was made, and on the eighteenth day of October, 1893, it was formally decreed that the libellant recover of the respondent their damages, together with the costs, and a reference was made to Edward F. Pugh, Esq., as Commisioner to ascertain and report such damages.

That on the eleventh day of June, 1894, the report of the Commissioner, with exceptions on behalf of both parties thereto, was filed, and on the ninth and twelfth days of November, 1894, a hearing of argument upon the report and exceptions was had.

3. That on the twenty-sixth day of November, 1894, an opinion of the Court was filed confirming the report of the Commissioner, and dismissing the exceptions thereto.

And on the seventh day of December, 1894, a final decree was entered in the cause ordering and decreeing that the libellant recover of the respondent the sum of $11,369.25 and costs, interest thereon to run from November 30, 1894.

4. That the respondent is advised, and its officers believe, that the said opinion and decree were erroneous, and that a decree should rightfully have been entered, adjudging that the respondent was not liable for loss or damage to the cargo, and that the said respondent was not liable for the full amount of the general average and special charges claimed, and sustaining the respondent's exceptions to the adjustment of said general average and special charges.

Wherefore the respondent prays that it may be allowed an appeal from the whole of the said decree to the next term of the Circuit Court of Appeals for the Third Circuit, and that the final decree in this cause be reversed.

THE LONDON ASSURANCE.

By C. L. DESPARD,

Manager.

UNITED STATES OF AMERICA,
STATE AND COUNTY OF NEW YORK. }

C. L. DESPARD, manager of the above-named company, having been duly sworn, says that the matters set forth in the petition are true to the best of his knowledge and belief, and that the appeal is not asked or taken for the purpose of delay; but because deponent believes injustice has been done to the petitioner. That the said company is a foreign corporation, and that he is the manager of the marine department thereof in New York, and as such has charge of the matters referred to in the foregoing petition. No other officer of said company is in the United States connected with the marine department.

Sworn to before me, this sixth day of December, 1894. } C. L. DESPARD.

JOHN A. HILLERY,
Notary Public,
[SEAL.] N. Y. Co.

E. HUNN HANSON,
HENRY S CATTELL,
MACFARLAND AND PARKIN,
Proctors.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

COMPANHIA DE MOAGENS DO BARREIRO

vs.

THE LONDON ASSURANCE.

ASSIGNMENT OF ERRORS.

The respondent assigns errrors as follows :

1. The Court erred in holding that a collision took place in New York harbor within the meaning of the policy of insurance.

2. The Court erred in holding that by reason of such alleged collision the respondent became liable for all partial loss or particular average which might thereafter happen to the cargo, whether attributable to said alleged collision or not.

3. The Court erred in holding that on the facts in this case the respondents were liable for a partial loss on the cargo.

4. The Court erred in overruling the respondent's first exception to the Commissioner's report.

5. The Court erred in overruling the respondent's second exception to the Commissioner's report.

6. The Court erred in overruling the respondent's third exception to the Commissioner's report.

7. The Court erred in overruling the respondent's fourth exception to the Commissioner's report.

8. The Court erred in overruling the respondent's fifth exception to the Commissioner's report.

9. The Court erred in overruling the respondent's sixth exception to the Commissioner's report.

10. The Court erred in overruling the respondent's seventh exception to the Commissioner's report.

11. The Court erred in overruling the respondent's eighth exception to the Commissioner's report.

12. The Court erred in overruling the respondent's ninth exception to the Commissioner's report.

13. The Court erred in overruling the respondent's tenth exception to the Commissioner's report.

14. The Court erred in overruling the respondent's eleventh exception to the Commissioner's report.

15. The Court erred in overruling the respondent's twelfth exception to the Commissioner's report.

16. The Court erred in overruling the respondent's thirteenth exception to the Commissioner's report.

17. The Court erred in overruling the respondent's fourteenth exception to the Commissioner's report.

18. The Court erred in overruling the respondent's fifteenth exception to the Commissioner's report.

19. The Court erred in overruling the respondent's sixteenth exception to the Commissioner's report.

20. The Court erred in overruling the respondent's seventeenth exception to the Commissioner's report.

21. The Court erred in overruling the respondent's eighteenth exception to the Commissioner's report.

22. The Court erred in overruling the respondent's nineteenth exception to the Commissioner's report.

23. The Court erred in overruling the respondent's twentieth exception to the Commissioner's report.

24. The Court erred in overruling the respondent's twenty-first exception to the Commissioner's report.

25. The Court erred in overruling the respondent's twenty-second exception to the Commissioner's report.

26. The Court erred in overruling the respondent's twenty-third exception to the Commissioner's report.

27. The Court erred in overruling the respondent's twenty-fourth exception to the Commissioner's report.

28. The Court erred in overruling the respondent's twenty-fifth exception to the Commissioner's report.

29 The Court erred in overruling the respondent's twenty-seventh exception to the Commissioner's report.

30 The Court erred in overruling the respondent's twenty-ninth exception to the Commissioner's report.

31 The Court erred in overruling the respondent's thirty-first exception to the Commissioner's report.

32 The Court erred in decreeing that by reason of the breaking of the steamer's bulwark upon the deck in the slip at New York, there was a collision within the meaning of the policy, although the loss was not attributable to such breaking, but to a wholly different cause.

33. The Court erred in sanctioning the adjustment of the loss by the Commissioner, which was in the same manner as if it were total, and not partial, and in basing its decree upon such adjustment.

34. The Court erred in decreeing that the breaking up of the voyage was *ex necessitate*, and not the voluntary act of the assured.

35. The Court erred in awarding judgment against the respondent for the sum of $11,269.25.

E. HUNN HANSON,
HENRY S. CATTELL,
MACFARLAND & PARKIN,
Proctors.

And thereupon the appeal is allowed upon the usual conditions.

K 75

KNOW ALL MEN BY THESE PRESENTS, That the American Surety Company (office in the Bullitt Building) in the City of Philadelphia and State of Pennsylvania, is held and firmly bound unto "Companhia de Moagens do Barreiro" in the sum of fifteen thousand dollars, lawful money of the United States, to be paid to the said "Companhia de Moagens do Barreiro," to which payment well and truly to be made the said the "American Surety Company" binds itself and its successors firmly by these presents, sealed with its seal and dated at Philadelphia, this fourteenth day of December, A. D. one thousand eight hundred and ninety-four.

WHEREAS, "The London Assurance" has lately appealed to the United States Circuit Court of Appeals for the Third Circuit from the decree of the Honorable William BUTLER, Judge of the District Court of the United States, for the Eastern District of Pennsylvania, made and pronounced in a certain Plea civil and maritime for insurance on wheat the cargo of the steamer *Liscard* therein lately depending between the said "Companhia de Moagens do Barreiro," libellant and appellee, and "The London Assurance," respondent and appellant.

Now, if the said appellant shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then this stipulation shall be void, otherwise to be and remain in full force and virtue.

Taken and subscribed before me this fourteenth day of December, A. D. 1894.

"AMERICAN SURETY COMPANY." [SEAL.]
By HENRY D. WELSH,
Vice-President. [SEAL.]

Sealed and delivered in the presence of us.
CHARLES S. LINCOLN,
WILLIAM W. CRAIG.

Attest:
STEPHEN W. WHITE,
Ass't Secretary.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

I, CHARLES S. LINCOLN, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the said District Court in a certain plea, civil and maritime, for marine insurance, therein lately depending, wherein the "Companhia de Moagens do Barreiro" is the libellant against "The London Assurance," respondent.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, at Philadelphia, this eighth day of February, A. D. 1895, and in the 119th year of the Independence of the United States.

WILLIAM W. CRAIG,
Pro Clerk.

COMPANHIA DE MOAGENS DO BARREIRO	U. S. D. C. for the E. D. of Pa.
vs.	
LONDON ASSURANCE.	No. 8, of 1892.

And now, to wit, this eleventh day of February, 1895, it is agreed between the proctor for the libellant and the proctor for the respondent that the following parts of the record shall be printed for the use of counsel and Court upon the argument in the United States Circuit Court of Appeals, to which the above case has been appealed, namely, the libel and libellant's evidence complete; the answer and the respondent's evidence complete; the opinion of the District Court; the report of the Commisioner to whom was referred the assessment of damages; the evidence taken before him; libellant's and respondent's exceptions to the Commissioner's report; opinion of the Court confirming the Commissioner's report;

petition for appeal to the Circuit Court of Appeals; assignments of error. All other parts of the record may be omitted and need not be printed.

It is also agreed that the decision of the appeal in the above-entitled cause shall determine the case by the same libellant against the Manheim Insurance Co., No. 9, of 1892; that the latter case need not be taken up and that no execution shall issue in the latter cause until the determination of the first case above referred to. Should a decision of the Circuit Court of Appeals in No. 8, of 1892, not cover the facts and law involved in case No. 9, of 1892, the latter case may then be appealed by either party.

JOHN F. LEWIS,
Proctor for Libellant.

HENRY S. CATTELL,
Proctor for Respondent.

And afterwards, to wit, on the twelfth day of March, A. D. 1895, come the parties aforesaid, by their counsel aforesaid, and this cause being called for argument on the transcript of record, and being argued by counsel for the respective parties, and the Court not being fully advised in the premises, takes further time for the consideration of the same.

And afterwards, to wit, on the fourteenth day of May, A. D. 1895, come the parties aforesaid, by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following opinion, viz.:

THE LONDON ASSURANCE,
Appellant,

vs.

COMPANHIA DE MOAGENS DO BARREIRO,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before Acheson, Dallas, and Buffington, JJ.

ACHESON, Cir. J.

This is an appeal by The London Assurance, a corporation of the Kingdom of Great Britain, the respondent in the Court below, from a decree of the District Court sitting in admiralty, in a suit on a policy of marine insurance.

The material facts as disclosed by the record are these: On the tenth day of December, 1890, The London Assurance insured for the libellants $20,000—on 33,000 bushels of wheat, the property of the libellants, valued at $40,887—shipped on board of the steamship *Liscard*, in the port of New York, for a voyage "at and from New York to Lisbon, Portugal." A policy in the usual form and a short certificate taken together constituted the contract of insurance.

The policy by its terms covers all losses and damages by the perils of the sea, but the certificate contains the memorandum—"*free of particular average unless the vessel be sunk, burned, stranded or in collision.*" The policy provides that the risk shall begin "upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel," and shall continue until the same shall be safely landed at the port of destination. The libellants shipped upon the *Liscard* for the same voyage other lots of wheat, which were insured in other companies upon the like terms and conditions. The loading of the wheat here in question and of the entire cargo on board the *Liscard* was completed and her bills of lading were signed and delivered to the libellants by December the 11th. On the next day, December 12th, the ship was unmoored for the purpose of starting on her voyage, but, on account of some trifling derangement of the engines, they would not work, and therefore the ship was made fast again to the wharf. After she was remoored, on the evening of the same day shortly after eight o'clock, the *Liscard* was run into by a scow, or lighter, in tow of the tug *George Curnie*. By this collision a break was made in the bulwark, or inclosed iron side of the *Liscard* above her deck. The break was a continuous one in two of the iron plates of the bulwark; was eleven feet long, and for most of its length was open a width of from one-half inch to one and a half inches. The bulwark was an important part of the vessel, essential in her design and construction, and intended to keep the water off her deck and hatches. A claim upon the tug and scow for damages sustained by the collision was made by the master of the *Liscard*, and the sum of $250—was paid in settlement. After the collision and before starting on her voyage, the vessel was surveyed and pronounced seaworthy. The *Liscard* finally left New York on December 15th.

In the course of her voyage the vessel encountered very bad weather—"gales and hurricanes"—which lasted eight days and by the excessive straining of the ship opened the

seams of the deck admitting water to the cargo; and in that way, and also by water going down the hatchways, from which the canvas coverings were swept by the storm, the wheat was injured. On December 24th the vessel put into Boston Bay in distress. At Boston the cargo was discharged into lighters for examination, and was found to be badly damaged by sea water and unfit for re-shipment in its then condition. A survey made January 16th, 1891, recommended that the entire cargo be sold for the benefit of all concerned. Later surveys reported the wheat to be in an improved condition in consequence of the judicious treatment to which it had been subjected. But by the last survey, which was made on February 28th, 1891, and from other evidence it appears, that none of the wheat had been restored to a first-rate condition. Even the part, reported by that survey as in "fair merchantable condition," was "slightly damp" and had a "slight smell." About one-half of the wheat remained in a seriously damaged state—a great part of it beyond remedy—and some was practically worthless. On February 20th all the underwriters on the cargo (including The London Assurance), agreed in writing that the payment of $3600—freight on the damaged cargo "and the acceptance and sale of said cargo" by the owners should be "without prejudice to any of the rights or claims othe shippers or owners of the cargo may have against the insurers of said cargo, and 'shall not be considered a waiver or an acceptance of an abandonment' and shall be without prejudice to any defence that the insurers of the cargo may have under their contract of insurance." On February 27th, the agents of the ship entered into an agreement with the agents of the owners of the cargo to terminate the voyage and surrender the cargo to the owners in consideration of the payment by them of $3600—as full freight, and this agreement was carried out. Shortly thereafter the owners of the cargo sold the greater part of the wheat at Boston, and a small portion which could not be disposed of there was taken to New York and sold.

The first question with which we have to deal arises upon

the memorandum clause—"*free of particular average unless the vessel be sunk, burned, stranded or in collision.*" This clause is of ancient origin, but originally was confined to the stranding of the ship. We learn from the elementary works on Marine Insurance that it was introduced into English policies, with respect to stranding, as early as the year 1749. Afterwards it was extended so as to cover other casualties to the ship besides stranding. The clause, "free from average unless general or the ship be stranded," was first judicially considered in 1754, curiously enough in an action against the present appellant (*Cantillon* v. *The London Assurance*, cited in 3 Burr. 1553), where it was held that these words amounted to a condition, and that, upon the ship's being stranded, the insured was let in to claim his whole partial loss. The London Assurance Company then struck the clause out of its policies, but has since reinserted it. *Marshall on Insurance*, 140 : 1 *Parsons on Marine Insurance*, 629, note 3. The meaning and effect of the clause were finally settled in 1797 in the leading case of *Burnett* v. *Kensington*, 7 Durnf. & E, 210, where the whole Court of King's Bench, after the fullest argument, and upon great consideration, determined, that a stranding destroys the exception in the memorandum and lets in the general words of a policy ; and that, therefore, where the ship has been stranded, the insurer is liable for any partial loss sustained by any of the articles mentioned in the memorandum, although such loss did not arise from the stranding, but solely from another cause. *Marshall on Insurance*, 151. This has been the accepted doctrine ever since that adjudication. All the text-book writers agree that this is the well-settled construction of the clause, and that if the ship be stranded while the memorandum articles are on board and during the continuance of the risk, then the underwriter is liable to pay all particular average losses, although they may have taken place at a different time, from a different cause, and at a different place. *Marshall, supra ; 2 Arnold on Marine Insurance*, 795 ; *McArthur on Marine Insurance*, 285 ; 1 *Parsons on Marine Insurance*, 630, 631.

It is true that Mr. Parsons criticises the grounds upon which this construction rests, and while stating that it is the established law of England, suggests that some question exists, whether the same construction would be given to the clause in this country. There has been, however, no American decision in conflict with the English doctrine, and a departure from that principle by our courts, we think, would be unwise. As was said by Mr. Justice GRAY in *Norrington* v. *Wright*, 115 U. S., 188, 206, "a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated."

Moreover, if the parties to a contract of insurance mean, that the insurer shall be liable for partial losses only when they are *occasioned* by the specified casualties, nothing is easier than to give expression to that intention. Thus, we find from the evidence that in Philadelphia, where this insurance was effected, marine underwriters employ two different clauses respecting particular average losses, to vary the risk as may be agreed on. One of these clauses is that used in this instance; the other is in these words—"Free of particular average unless caused by stranding, sinking, burning, or collision." It cannot be doubted, that the parties to the contract in suit intelligently adopted the form which omits the "caused-by" limitation.

It is a sound principle of interpretation, that words whose meaning has been defined by the law or fixed by judicial decision will be presumed to have been used in that sense. 2 *Parsons on Contracts*, *501, note *t*; *Doebeler's Appeal*, 64 Pa., 9, 15. That principle should have full sway here. If this is not to be regarded as a contract subject in all respects to the law of England, by reason of the fact that the policy and certificates were issued in Philadelphia by a local agency of the insurance company, still the company is an English corporation, and the certificate of insurance provides, that any loss "shall be reported to the corporation in London" and shall be paid there, and that

claims shall be adjusted according to "the usages of Lloyds;" and the certificate contains a notice that "to conform with the revenue laws of Great Britain," in order to collect a claim thereunder, "it must be stamped within ten days after its receipt in the United Kingdom." Now, the words here involved are the words of this corporation, and it may reasonably be assumed that they were used in the sense given to them by the English law.

Furthermore, if an exception in a policy of insurance be capable of two interpretations equally reasonable, that one must be adopted which is most favorable to the insured. *The Western Insurance Company* v. *Cropper*, 32 Pa., 351; *National Bank* v. *Insurance Co.*, 95 U. S., 673, 679. In the latter case, the Court said, in reference to the insurance company: "It is its language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

From whatever point of view, then, the subject is regarded, we think, that the Court below was right in construing the particular average clause of the contract in accordance with the English doctrine.

Was, then, the *Liscard* "in collision," within the meaning of the contract of insurance? We think that she was. Undoubtedly in an admiralty sense there was a collision, notwithstanding the fact that the *Liscard* was at rest and moored, when she was ran into. *The Granite State*, 3 Wall. 310. Now, with respect to stranding Mr. Parsons (1 Marine Insurance, 632) says: "Both in England and in this country, it seems to be settled that if the ship be literally stranded that is enough without much reference to the length of time that she remains on shore, or any regard to the effect of this stoppage." Thus in *Harman* vs. *Vaux*, 3 Campl., 429, Lord Ellenborough, C. J., said "If the ship touches and runs—the circumstance is not to be regarded. There she is never in a quiescent state. But if she is forced ashore, or is driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she

thereby sustains." Certainly the same effect must be given to the particular average clause, whether the case before the court be one of stranding or of collision. The two casualties are alike in that all the evil effects to a vessel from the disaster oftentimes are not at once evident. In this instance there was an actual collision, resulting in substantial injury to the vessel. True, the injury was not such as to affect the seaworthiness of the ship; she was still in a fit state to encounter the ordinary perils of the contemplated voyage. The particular average clause, however, is silent as to the extent of the injury to the vessel. The words—"unless the vessel be * * * in collision"—exclude other conditions. Therefore, also, it is immaterial, whether or not the collision contributed to the ultimate partial loss to the cargo. The very purpose of the clause, all the adjudged cases declare, is to exclude such an inquiry which always is attended with difficulties and often must end in uncertainty. Upon this very point there is here a conflict of proof. There is some evidence tending to show that, during the tempestuous weather the *Liscard* encountered, some water did come on deck through the broken plates in the bulwark and reached the cargo; and at least one seafaring witness of great practical experience expresses the opinion, that a large quantity of water in a gale, accompanied by high sea, would go through the break in the ship's bulwark caused by the collision. But it is not necessary to determine the question whether any damage to the wheat was due to the break. The fact of collision, like the simplest fact of stranding, fulfills the condition of the particular average clause, which then ceases to have any operation. The circumstances, of the collision occurred before the *Liscard* actually started on her voyage, is of no moment. The insurance had attached before the collision. That is the decisive fact. By the terms of the contract, the adventure with respect to the wheat began as soon as it was put on board the vessels The effect of the collision, then, under the particular average clause, was the same as if it had taken place in midocean.

The views we have expressed are entirely harmonious with the ruling in *Roux* v. *Salvador*, 1 Bing. N. C., 526, and *The Thames and Mersey Marine Insurance Company* v. *Pitts*. Law Rep., 1 Q. B., 476, cited by the appellant. In the former of these cases, the stranding did not occur until after the hides had been landed and sold, and the risk of the underwriters thereon had thus ceased by the act of the insured. In the latter case, at the time of the stranding of the ship, the maize was not on her, nor at her risk at all, and, indeed, the ship's voyage with respect to the maize began afterwards. In each of these cases the Court recognized the binding authority of *Burnett* v. *Kensington, supra*. In *The Thames, etc., Co.* v. *Pitts.*, which was decided as late as the year 1893, COLLINS, J., said: "If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average loss, whether the damage can be traced to the particular stranding or not."

Nor do we think that our conclusion, that the *Liscard* was "in collision" within the meaning of the contract in suit, is inconsistent with the ruling in the case of *The Glenlivet*, Law Rep., Probate Div. (1893), p. 164, S. C., on appeal *Id.* (1894), p. 48. There the English Court of Appeal, in affirming the judgment of the trial Judge, without approving his reasoning, decided merely that, where slight fires occurred in the coal in the bunkers of an iron ship, which were put out by pumping water on the coal, and some injury was done by the heat to the ship's plating and otherwise, the ship was not "burned" within the meaning of that term, as used in the memorandum in the policy.

We pass now to the consideration of the question of the adjustment of the loss. This matter is thus presented in the appellant's second specification of error, namely:—"II. The Commissioner reported that the voyage was broken up at Boston for the benefit of all concerned, including the underwriters; that the libellants' adventure was practically frustrated and therefore justifiably abandoned; that if the cargo had been reshipped to Lisbon the loss would have been much

greater than it has proved, and the underwriters worse off than now, and that they would have been obliged to pay the difference between the price for which the damaged grain sold and the value of sound grain in Lisbon proportioned to the valuation in the policy; that the amount they would then have been called upon to pay would have been greater than the difference between the value of the cargo as stated in the policy and the amount for which it was sold in Boston, and the commissioner reported that the respondent was liable for this difference and adjusted the loss under the policy as a salvage loss instead of as a particular average. The respondent excepted to these several findings and to this adjustment of the loss and to the commissioner's refusal to adjust the loss as a particular average, with Boston as the port of the destination and the sales made there as determining the percentage of deterioration for which the underwriters were liable. The Court overruled the exception and the respondent specifies such action of the Court as error."

We have carefully examined the evidence and the legal authorities cited and are not convinced that the commissioner erred either in his findings of fact, or in his method of estimating the loss on the cargo. The breaking up of the voyage and the sale of the cargo at the port of distress were not for the benefit of the insured solely. What was thus done was really for the advantage of all persons interested, including the underwriters. As we have already seen, the wheat was all more or less damaged. Now, it appears that the condition of affairs in Portugal with respect to the importation of wheat is peculiar, and that damaged grain is unsaleable there. The finding of the commissioner is, that the *Liscard's* wheat would have been almost valuless at Lisbon. The evidence certainly warrants the conclusion, that the loss to the appellant would have been greater, had the cargo gone to Lisbon. We agree with the commissioner and the court below in view that the adventure was practically frustrated, and hence, justifiably abandoned; and that, under the special circumstances, the sale

of the wheat at Boston may fairly be considered to have been made from necessity for the benefit of all concerned. Mr. Parsons (2 *Marine Insurance*, 411) says, that, if a ship at an intermediate port finds a part of its cargo so injured by sea damage that it is unfit to be carried on, it may be sold at that port, and the loss adjusted as a salvage loss. Mr. Phillips (2 *Insurance*, *sec.* 1480) says, speaking of an adjustment as upon a salvage loss: "The underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port is obviously expedient, and made on account of damage by the perils insured against; where, if the subject were forwarded to the port of destination, it would be greatly diminished in value or be of no value, on arriving there." We think that the present case falls within the rule even as thus laid down, and that the appellant is justly chargable with the difference between the valuation in the policy and the sum realized by the sale, and that the adjustment upon that basis was correct.

The specifications relating to some allowances under the sue and labor clause of the policy do not require extended discussion. We have looked into these matters, and our judgment is, that the appellant has here no reasonable cause of complaint. Nor do we discover that any injustice was done to the appellant in the allowance of interest from December 15, 1891, on the libellants' claim.

We see no error in the conclusions of the District Court, and, therefore, its decree is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

March Term, 1895. No. 6.

LONDON ASSURANCE,

Appellant,

vs.

COMPANHIA DE MOAGENS DO BARREIRO.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause, be, and the same is hereby affirmed, with costs.

GEORGE M. DALLAS
Cir J.

PHILADELPHIA, May 17, 1895.

UUITED STATES OF AMERICA, *Set.*

I, WILLIAM V. WILLIAMSON, Clerk of the United States Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the

original Transcript of record in the case of The London Assurance, Appellant, vs. Companhia de Moagens do Barreiro, No. 6, March Term, 1895, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

WM. V. WILLIAMSON,

Clerk U. S. Circuit Court of Appeals, Third Circuit.

345 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Being informed that there is now pending before you a suit in which The London Assurance is appellant and Companhia de Moagens do Barreiro is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
346 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

347 [Endorsed:] Supreme Court of the United States. No. 1033. October term, 1894. The London Assurance *vs.* Companhia de Moagens do Barreiro. Writ of certiorari.

348 United States Circuit Court of Appeals, Third Circuit.

THE LONDON ASSURANCE, Appellant,
against
COMPANHIA DE MOAGENS DO BARREIRO, Appellee.

It is hereby stipulated by and between counsel for the respective parties hereto that the certified transcript of the record in the above-entitled cause, filed with the clerk of the United States Supreme Court with the appellant's petition

to said court for a writ of certiorari, be taken as the return to the writ of certiorari issued on said petition, and that the clerk of this court may so certify.

May 5th, 1896. W. W. MACFARLAND,
Counsel for the London Assurance, Appellant.
JOHN F. LEWIS,
Counsel for Companhia de Moagens do Barreiro, Appellee.

(If any part of record material to issue be omitted, counsel upon either side may have same inserted.)

Filed May 17, 1896. J. F. L.

348½ UNITED STATES OF AMERICA, *sct:*

I, William V. Williamson, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto annexed as my return to the said writ on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 18th day of May, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. V. WILLIAMSON,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

349 [Endorsed:] 1033. October term, 1894. No. 6. March term, 1895. United States circuit court of appeals, third circuit. London Assurance, appellant, *v.* Companhia de Moagens do Barreiro. Certified copy of return to writ of certiorari.

350 Endorsed on cover: Case No. 15,917. Supreme Court U. S., October term, 1896. Term No., 280. The London Assurance, app't, *vs.* Companhia de Moagens do Barreiro. Writ of certiorari and return. Filed May 19, 1896.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE LONDON ASSURANCE CORPORATION,

Respondent,

against

COMPANHIA DE MOAGENS DO BARREIRO,

Libellants.

BRIEF ON BEHALF OF RESPONDENT.

W. W. MacFARLAND,
WILLIAM PARKIN,
Of Counsel.

The Evening Post Job Printing House, New York.

United States Supreme Court.

THE LONDON ASSURANCE CORPORATION,
Respondent,

AGAINST

COMPANHIA DE MOAGENS DO BARREIRO,
Libellants.

BRIEF FOR THE APPELLANT.

Statement.

This is a cause brought up by *certiorari* to review a decision of the Circuit Court of Appeals for the Third Circuit. The suit was brought in the Admiralty Court by the Companhia de Moagens do Barreiro on a policy of a marine insurance issued by the London Assurance Corporation. A similar suit was at the same time brought on a policy issued by the Mannheim Insurance Company. Decrees went against the insurers, and an appeal was taken to the Circuit Court of Appeals by the London Assurance Corporation, a stipulation being made that the judgment should also determine the other suit. The Circuit Court of Appeals affirmed the decree, and on petition of the London Assurance this Court issued a *certiorari* to review the decision.

The suit is founded upon a policy of marine insurance issued by the respondent to the libellants under

date of December 10, 1890 (Libel, p. 4). The amount of insurance was $20,000, and it covered 33,000 bushels of wheat, valued at $40,877, on board S. S. *Liscard*, consigned to libellants at Lisbon, Portugal (*Id.*).

The *Liscard* sailed from New York December 15, 1890. While on the voyage, the steamer encountered weather of so much severity that it was found necessary to put into the port of Boston in distress, where she arrived on the 24th of December (pp. 5, 6). The wheat was there inspected and found to have been damaged by water breaking through the "strained and opened seams of the deck," in consequence of the storm (p. 5).

The libellants gave the respondent notice of abandonment, which the latter refused to accept (p. 6). It will appear from the facts stated below that this notice was afterwards practically revoked.

At Boston the wheat was unloaded and reconditioned, and the ship was repaired (p. 6, 7) and was ready to proceed, but by agreement the voyage was terminated there (pp. 179, 180).

The libellants further allege that "after deducting the proceeds of said sale, the claim of the libellants under said policy, as and for a *partial loss* upon the wheat insured as aforesaid, amounts to the sum of $10,451.34." They also state a claim under the sue and labor clause of the policy and for general average (pp. 6, 7). No question is presented as to the general average.

These claims are founded upon the theory of liability stated in the third and fourth paragraphs of the libel (pp. 5-6). The policy was not a general policy; it contained the following memorandum clause: "*Free from particular average, unless the vessel be sunk, burnt, stranded or in collision.*" And if these words were not deleted from the policy as the legal result of the following facts, it is conceded that the libellants cannot recover anything in respect to the charges brought under review here by the exceptions. But the libellants insist that after

the wheat was on board, but while the vessel was still in her berth preparing to start on her voyage, she was in collision, and that such collision had in point of law the effect of deleting the memorandum and making the insurance *general.*

The facts in regard to the collision as stated in the evidence for the libellants are as follows:

While the *Liscard* lay in the same berth where she had taken in her cargo, a tug passed out towing a lighter or scow, and in passing the latter slightly grazed the bulwark of the *Liscard* on the port side, causing a trifling crack in the bulwark, which was of iron, about ½ an inch thick (pp. 26-27). The crack was above the deck in two of the iron plates and extended irregularly for some eight feet, as shown by the sketch (p. 42), and it was from ½ to 1½ inches wide. The *Liscard* was afterwards surveyed, the crack was pronounced to be of no importance, not needing to be repaired for six months, or until the vessel reached her home port (pp. 26, 27, 28, 34, 38, 40, 72, 80, 92).

When the *Liscard* first arrived at Boston, Peter Wright & Sons, the agents for the vessel, took possession of the wheat, and caused it to be reconditioned (pp. 113, 235). As a result of the process the wheat could have been forwarded to Lisbon without risk of further deterioration (pp. 56, 97). All along the owners of the wheat, represented by Lawrence Johnson & Co., had wished to terminate the voyage at Boston and obtain possession of it, that they might sell it there (pp. 114, 179, 180, 189). But the ship refused to give up the cargo without the payment of full freight, and insisted upon her right to carry it forward (p. 189). Protracted negotiations followed between the owners of the ship and the owners of the wheat, and finally an agreement was reached for terminating the voyage at Boston (pp. 199, 189, 179).

Johnson, the active agent for the owners of the wheat, says: "Before we could get the cargo to dis-

pose of it to the best buyers and finally recondition it, we were compelled to pay under a compromise freight amounting to $3,600 and deposit in bank $12,000 in cash * * * We had treated for weeks to get the cargo on better terms" (p. 179).

The agreement finally made is set out at page 87. Among other things it is recited that: "Whereas the said steamer has put into Boston in distress, with her cargo damaged, *and both parties consent that the voyage shall be broken up at Boston and the cargo there delivered to the parties of the second part on terms below stated.*"

Thereupon, in order to facilitate the agreement between the owners of the wheat and the shipowner, the underwriters signed a stipulation in the following terms:

"The underwriters on cargo are willing now as they always have been that the payment of thirty-six hundred dollars ($3,600) freight on the damaged cargo of the steamer *Liscard* by Lawrence Johnson & Co., and the acceptance and sale of said cargo by them shall be without prejudice to any of the rights or claims the shippers or owners of the cargo may have against the insurers of said cargo, and 'shall not be considered a waiver or an acceptance of an abandonment,' and shall be without prejudice to any defense that the insurers of the cargo may have under their contract of insurance" (p. 315).

It will be seen that the underwriters merely assented to the breaking up of the voyage at Boston, leaving all the incidents thereof and all other facts to the judgment of the law.

In the following March the libellants sold their wheat (p. 319), which brought 84½ per cent. of sound value (pp. 262, 320). The purchasers exported it to Liverpool, Antwerp and other European ports (pp. 56, 208).

It is obvious that the proceedings above mentioned necessarily involved a revocation of the notice of abandonment.

With the results of this sale the respondents are

not concerned, unless the theory of the libel should be sustained and it should be held that the memo randum "free from particular average," was as matter of law deleted by the so-called collision while the *Liscard* was in her berth. But if it should be so held, then the result of the sale would have an important bearing upon the measure of the respondent's liability.

The libellants' claim, as stated in the libel, and more precisely defined in their specification before the Commissioner (pp. 116, 126), is a claim for particular average or partial loss, and in all such cases the sale fixes the percentage of deterioration from sound value and thereby determines the extent of the liability of the insurer, as shown in the argument to follow. For example, in this case the sale showed a deterioration of 15½ per cent. of sound value, and the libellants, even if the memorandum was deleted, as they insist, would be entitled to recover only 15½ per cent. of the policy, which was for $20,000, as further shown in the argument to follow.

But while this is axiomatic in the law of marine insurance, the Commissioner, nevertheless, upon a theory of his own, not suggested by either party, applied to the adjustment of the particular average the rule (radically different) applicable to a total loss with salvage, or what is technically called a salvage loss (pp. 126–132).

The theory of the Commissioner had relation to the supposed condition of the Lisbon market, and to what he thought might have happened if the voyage had not been broken up and the wheat had reached Lisbon. It appeared upon the cross-examination of Mr. Johnson, a witness for the libellants, that owing to the peculiar laws of Portugal there is practically no market in Lisbon for imported wheat; that wheat is imported directly by the owners of flour mills to be made into flour (which was the case here), and the amount which each miller may import is specified and limited (p. 242). There was no evi-

dence of the value of the wheat to the owners at Lisbon, for use in their flour mills, after it had been reconditioned. Nor for the reason above mentioned would the Lisbon market have afforded any measure of value. Nevertheless, the Commissioner assumed that if the wheat had gone forward to Lisbon, upon an adjustment there, the liability of the underwriters would have equaled the amount ascertained by adjusting the loss as a salvage loss at Boston, instead of a partial loss, and for that reason applied to the case the rule of salvage loss. The decision on this point is the subject of one of the assignments of error.

It appears from the above facts that the voyage was broken up at Boston by the desire of the libellants, and as the result of their strenuous exertions to that end. Nevertheless, the Commissioner charged the respondent with expenses incident to the breaking up of the voyage, namely, $500 for the charge of the libellants' agent, and $610 for legal services, and a few other items, stated in his report (pp. 141, 143, 144, 145).

In the argument it is submitted that this was palpable error in any view of the case.

Assignment of Errors.

I.—The Court erred in deciding that the alleged collision was such as in legal effect to efface the memorandum, make the policy general and subject the insurer to liability for particular average.

II.—The Court erred in deciding that the particular average should be adjusted according to the rule applicable to cases of total loss with salvage.

III.—The Court erred in deciding that in the adjustment of the loss the insurer was liable for the expense of reconditioning the wheat.

IV.—The Court erred in deciding that the insurer was liable for the expenses incident to the breaking up of the voyage.

ARGUMENT.

First.

Damage to cargo caused by a sea peril in the course of a voyage cannot, for the purpose of deleting the memorandum, be attributed to a collision while the ship is still at her wharf, and before breaking ground for the voyage.

I.—It must be conceded that this proposition is true, unless the maxim *causa proxima non remota spectatur* is to be in this single instance ignored as a rule of decision in marine insurance. The argument against the proposition and the grounds of the decision below may be briefly stated as follows: It is said that in Burnett *v.* Kensington (7th Durnf. & E., 210) it was laid down as a rule of English law that the word "stranding" in the memorandum was to be construed as a condition; hence, any stranding fulfilled the condition, though in fact it had no relation to the damage; that the rule is still in force in that country and ought to be adopted here. Further, that the Court having adopted the English rule as to "stranding," should extend it to a case of collision, and, as there was a collision in this case while the vessel was at her wharf, should decide that *that* collision deleted the memorandum, and thus permit the *imputation* of the subsequent damage to that collision.

II.—To understand this argument and see where it would lead it is necessary to examine the reasons on which the English rule in regard to "stranding" rests. It is said to be founded on a presumed "convention" between insurer and insured to the effect, "that where a ship is stranded the underwriters agree to attribute the damage to the stranding in

order to avoid a long and difficult examination of the circumstances."

Thames, &c., Co. *v.* Pitts, 1 Q. B., 1893, p. 477.

The above rule assumes the absence in the particular case of any competing principle of the law of marine insurance which would prevent a recovery in case the damage was *in fact* due to the injury to the vessel before breaking ground for the voyage, and then dispenses with proof of that fact by a presumption of its existence. In a case where the facts make it probable that injury to the vessel is the real antecedent and cause of the damage, the function of the presumption is correspondingly lessened, and where such injury to the vessel is palpably the efficient antecedent, presumption may be dispensed with altogether and the actual fact be substituted. Hence it follows, that if a collision *in the berth* is within the supposed rule, and if *such* a collision deletes the memorandum and permits subsequent damage to be attributed to the injury to the ship there by the fiction of relation, then the more serious the injury and its relation to seaworthiness, the easier the presumption that it was the cause of damage to the cargo, and therefore the stronger would be the case; and if the loss was plainly due to unseaworthiness of the ship caused by the collision, the right to recover would be clear; and such is, in fact, the theory of the opinion below (p. 341).

III.—But it is obvious that this position cannot be maintained, *for it assumes another "convention" by which the underwriter agrees that the warranty of seaworthiness shall be considered as effaced; for, unless this warranty is deleted, it is as matter of law wholly impossible to attribute damage to cargo while on the voyage to an injury to the ship while still at the wharf and before breaking ground for the voyage, and which it was the shipowner's duty to make good by repairs, and so thor-*

oughly that it could not be the antecedent or cause of the damage to cargo.

In all policies of marine insurance, there is a warranty on the part of the insured owner of cargo, that the ship shall be seaworthy on breaking ground for the voyage; "the policy on goods is equally conditional as if it were a policy on the ship itself."

Arnould on Marine Ins., 6th Ed., pp. 650, 651.
Phillips on Ins., par. 695.

> "The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. *It is not sufficient that the ship was fit for the voyage while the cargo was being taken in if she becomes unfit before she started. The warranty in truth appears to be a double one in that the ship shall be fit to receive the cargo when receiving it, and fit to sail at the time of sailing.*"
>
> Carver on Carriage by Sea, p. 22.

The rule is inexorable, the warranty extends to defects the most obscure and not discoverable by any degree of diligence.

The *Caledonia*, 157 U. S., 124.

IV.—Having thus shown that on principle it is not possible by the fiction of a "convention" to attribute damage to cargo from a sea peril while the ship is on her voyage, to a theoretical injury to the ship while still at her wharf, it remains to add that in no decided case or even text book is there so much as an intimation that in such a case damage to cargo can be *presumed* to have resulted from any sort of damage to the ship while still in her berth. On the other hand there is express authority to the contrary. In Thames, &c., *v.* Pitts (*supra*), the ship had received part of her cargo at San Nicholas on the *Rio Plata*, and was stranded while on her way to Buenos Ayres to receive the rest. No question arose as to the cargo *on*

board at the time of the stranding, but only as to a part which was then on lighters. The whole cargo was afterwards damaged by heavy weather on the voyage, and the point was whether there could be a recovery for damage to the wheat that was on lighters at the time of the stranding. It was decided that there could not be a recovery because the wheat was not on board the ship at the time. To the further argument that the ship might have been so strained by the stranding as to weaken her and affect seaworthiness, it was replied by Collins, *J.*: "The ship was surveyed and found seaworthy, which prevents the antecedent stranding having any connection in point of fact with the damage." It is of course implied that the warranty of seaworthiness would be an answer to the argument, while it is expressly stated that the survey itself without going further precluded any reference to the antecedent stranding as a cause of damage without regard to the fact whether the wheat was on board or not.

So in this case, after the collision the vessel was surveyed and found seaworthy, and the fiction of relation is excluded both by the warranty of seaworthiness which the fiction cannot be permitted to efface, and also by the survey "which prevents the antecedent *collision* having any connection in point of fact with the damage."

V.—It is said the wheat was on board and a risk had attached at the time of the collision. That is quite true, but obviously irrelevant. It is not denied that if the wheat had sustained actual damage while on board of the ship at her wharf from any cause within terms of the policy applicable to port risks, such actual damage would have had to be made good.

Carver says (*supra*) that the warranty of seaworthiness is a double one, "in that the ship shall be fit to receive the cargo when receiving it, and fit to sail at the time of sailing." The ship being fit to

receive the cargo, if there should be a collision while still in her berth, but not causing any damage to cargo, it may be that the memorandum would open to let in a claim in the case of actual damage to cargo from some other cause while the ship still remained *in the same place*. So far as this case is concerned the point is merely speculative, but however it might be in such a case, it is entirely certain that the other warranty, namely, that the ship shall be "fit to sail at the time of sailing," would exclude any actual or theoretical relation between the collision in the berth and damage from sea peril while on the voyage.

Second.

The rule as to stranding laid down in Burnett v. *Kensington is wholly irrelevant in any view of the case.*

I.—The rule laid down in that case to the effect that the word *stranding* in the memorandum imports a condition which is fulfilled by any stranding, though it may be wholly unrelated to subsequent damage to cargo, while it has been reluctantly followed by the English Courts, has never been adopted by the Courts of this country, and is expressly disapproved by all our text writers.

1 Parsons on Marine Insurance, pp. 630, 631.

3 Kent's Com., 10 Ed., pp. 403, 406.

We say reluctantly followed in England, for as long ago as McDougal *v.* Royal Ex. Asso. (4 Camp., 283) Lord Ellenborough said: "There has been a curiosity in the cases about stranding not creditable to our law." And he held in that case that there must be something more than a merely nominal strand-

ing, saying that it must be such "that the ship may *pro tempore* be considered as wrecked;" that is to say, there must be a real, substantial stranding that might rationally be supposed to have had some actual relation to damage to cargo, which investigation would disclose.

The latest expression of judicial opinion in England adopts and supports the views of Lord Ellenborough.

In the case of the Glenlivit (Probate Division, 1893, p. 164, affirmed on appeal Probate Division, 1894, p. 48), in which case the point was as to the construction of the word "burnt" in the memorandum, Barnes, *J.*, said:

> "There have been a large number of decisions upon the word stranding, and in these, various definitions of that word may be found, but in my opinion there runs through them all in a greater or less degree the idea which was probably present to the mind of the framers of the memorandum of a *serious* casualty to the ship affecting her safety and navigation even though as matter of fact the amount of damage sustained by the ship is unimportant."

Thus holding that the relation of cause and effect in such a case cannot be wholly excluded from consideration, and that the facts must be such as not to entirely prevent some sort of common sense relation between the stranding and damage. But it stands to reason, and we have seen above that a survey and certificate of seaworthiness *after* a stranding, and consequently after a collission does absolutely exclude any theory of such relation. On this point it is instructive to note that about the time of Burnett *v.* Kensington, the word "stranding," in Article 46 of the Ordonnance de la Marine, received practically the same construction by the French Courts. It was unsatisfactory and the ruling was corrected by an ordinance of August 17, 1779. Emerigon on Insurance, Meredith, 325, 326.

II.—But this was a case of collision, not of stranding, and the sole basis of the opinion below is a supposed analogy. An argument by analogy is founded upon an assumed *likeness* between the things compared, and the strength of the argument depends altogether upon the number and importance of the particulars in which they resemble each other. There is no likeness between a collision and a stranding. In the former case the effect is palpable, and as a rule immediately apparent. In the latter it may be latent and obscure. Moreover, the ancient construction of the word "stranding," as a condition, may have had some relation to the conditions of navigation at that period, all of which have been completely revolutionized by steam, the electric telegraph and improved charts. But it does not much matter if by a forced analogy the other words of the memorandum, such as "burnt" and "collision," be construed as words of condition, provided that a proper and rational rule be applied in the particular case, and such a rule must call, not for a merely nominal or theoretical, but for a *substantial* fulfillment of the condition, and such is emphatically the doctrine of the later English decisions.

It is plain that the word "burnt" in the memorandum has, for the purpose of construction by analogy, a closer relation to the word "collision" than the word stranding, because in the case of a collision or burning, the consequences are at once perceptible, and, therefore, if we are to resort to analogy for a rule, we should consult a decision on the interpretation of "burnt" rather than of the word "stranded." The *Glenlivit* (*supra*), as said above, was a case that turned on the construction of the word "burnt" in the memorandum. The following citations from the opinions sufficiently exhibit the facts as well as the conclusions:

Barnes *J.*, in his judgment below said:

> "The contention of the plaintiff is that the ship is 'burnt' within the true meaning of

the clause, if any injury whatever is done by fire to any part of the vessel, or any part of her fittings or stores, if anything included in the term ship is on fire, for however short a time, or damaged by fire however slightly. * * * I cannot bring myself to think that it would be a reasonable or businesslike construction to hold that the ship is burnt if any part of her, or of her stores, or if her fittings are slightly injured by fire, whether the fire is one which exhausts itself without damage to the vessel, or, as was also suggested by the plaintiff's counsel, is one which, unless promptly extinguished, would cause danger to the vessel. In my opinion, the more reasonable and businesslike construction is that the ship is burnt whenever the injury by fire is sufficient to cause *some interruption to the voyage*. That may be expressed by the term *temporarily innavigable*."

On appeal, Lindley, *J.*, said:

"We have to consider whether the ship was burnt within the meaning of the expression there used. Now, the facts are not in dispute. There was a fire on board this ship in one of the coal bunkers, and the *fire was so severe that some damage was done to the structure of the ship;* it is unnecessary to particularize it, but a plate got cracked and some angle irons got bent. The ship was an iron ship. How much wood was on board I do not know, but it is sufficient to say that the fire *clearly injured the ship*. Now comes the question whether the ship was "burnt." Barnes, *J.*, has held that it was not, and in my opinion that is *obviously right;* I say obviously because we must look at this word "burnt" in reference to the context; it is a part of a phrase "unless the ship is stranded, sunk or burnt." What does that mean? I take it the context shows that what is meant is, that the ship, *as a whole must be stranded, sunk or burnt*, and I cannot accept the suggestion of plaintiff's counsel that any fire on board a ship doing a little *structural* damage to the ship itself, is a burning in *ordinary* language. * * * Of course, in one sense it is burnt;

anything that burns any part of a ship is a burning of the ship, but I cannot think that this is the meaning of it here" (pp. 52, 53).

III.—There does not appear to have been any judicial decision by any Court in England or this country on the construction of the word "collision" in the memorandum. But if a ship is not "burnt" within the meaning of the memorandum unless the burning affects more or less seriously the stability of the ship, the word "collision" must be held to call for something more than mere *contact*, producing no results or none of any importance, as was the case here, where the survey pronounced that the crack in the bulwark would require no attention for six months (pp. 82, 72), and "*did not in any way affect her efficiency and seagoing qualities*" (p. 72).

The surveyor, Condon, says: "The purpose of a bulwark of a vessel is nothing more nor less than for the protection of those who are on the deck, work about the deck. It does in some degree, of course, keep out the light sea's spray water and so on, *but it has nothing whatever to do with the safety of the ship.* I have known some times when a vessel has been rather in danger by these bulwarks" (p. 73; see also pp. 80, 85). They are no protection to the hatches, for when water is taken in they retain it for a time on deck, and the swash tends to "lift the tarpaulins while a sea coming on board a vessel with rails runs right off" (p. 86). The same witness says (and there is no dispute as to the fact): "A crack in the bulwarks is a most unimportant thing, and is often seen; we have several ships now with cracks in the bulwarks from three feet and upwards caused by the iron tubs" (p. 86). "The bulwarks of steamers as far as I have seen, are not part of the frame, they are made of lighter material with stanchions inside to fasten them to the deck" (p. 89). "Many modern steamships are without bulwarks, having in place a railing of iron rods to protect the men on deck" (p. 79).

Candage, a marine surveyor, and a witness for the libellants, describes the crack and exhibits a sketch of it (p. 43). He says: "The bulwarks were of plate or sheet iron, three feet high above the deck" (p. 44).

The technical definition of bulwarks is "the *fence* built around the vessel over the covering board (plank shears). Bulwarks are sometimes of wood and again of iron; they are secured to the bulwark stanchions, which in turn are bolted on to the timbers."

Patterson's Nautical Dictionary, p. 30.

The lighter touched nothing but this bulwark, which was merely a "fence," no substantial part of the ship, and called for no repairs. A glance at the sketch of the crack will show that it was a trivial matter, not in the slightest degree affecting the ship as a whole, a fact that the libellants deemed it important to accentuate by evidence; the master says that when the ship left New York "she was efficient throughout for her intended voyage" (p. 29). Indeed it was the same thing as if the scow had grazed a fender or the ship's ladder.

It follows necessarily that if the word "collision" like the word "burnt" is to be taken to mean something really and substantially affecting the ship as a whole, *i. e.*, its "structure," in a practical business sense, and is not to be regarded as the verbal expression of an abstraction, having no relation to realities, then there was no collision in this case within the true meaning of the memorandum.

Neither the precise question nor any of its analogues has ever been passed upon by the courts of this country, nor in English decisions does there appear to have been any construction of the word "collision" in the memorandum as said above.

The case of the *Glenlivit*, however, plainly points the way to a sound, common sense interpretation. If the point were new and now to be presented in

the English courts for the first time, it cannot be doubted that it would be held that all the words of the memorandum should be construed in subordination to the fundamental maxim in marine insurance "*causa proxima non remota spectatur.*"

Arnould on Marine Ins., p. 727.

In the courts of this country that maxim has always prevailed, nor has it in a single instance failed to be rigorously applied. No good reason can be assigned for rejecting it in the construction of the words in the memorandum.

As Jessel, Master of the Rolls, said (L. R., 13 Ch. Div., 710), the modern rather than ancient precedents should be consulted in the particular case, and the tendency of modern English decisions is against perpetuating what Lord Ellenborough called "*a curiosity*" in the decisions under the memorandum clause in marine policies.

IV.—In the opinion of the Court below an inference is drawn from the fact that after the decision in Burnett *v.* Kensington, no change was made in the memorandum clause, quite overlooking the very great, indeed almost insurmountable, difficulty of making such change. Clauses once introduced into standard forms of policies by a convention of underwriters speedily become the property, as it were, of the maritime world, and it is not less difficult to obtain approval for a change than it would be to secure an amendment to the Federal Constitution.

Third.

The claim of the libellants is for particular average or partial loss, but in the adjustment the Court treated the case as one of total loss with salvage; this was erroneous.

I.—After the wheat had been reconditioned at Boston, no obstacle remained to proceeding on the voyage to Lisbon. But in that situation, the libellants from considerations of self-interest desired to terminate the voyage at Boston, and as we have seen, obtained the consent of the respondent to that course, the latter expressly reserving all rights. Accordingly, the libellants received their wheat at Boston in full ownership, free to do with it what they pleased, subject only to the duty of respecting the legal rights of the insurer. The libellants having received the wheat, proceeded to sell it at Boston at private sale, and then filed their libel, in which they state the claim to be for a *partial* loss under the policy. It is then argumentatively stated (p. 5, par. 7) that if the wheat had gone on to Lisbon after reconditioning "*said transportation to its destination would have resulted in a total loss in the value of the said cargo to the libellants;* that by reason of said (*i. e.* the supposed total loss at Lisbon) total loss of value, the London Assurance became bound to pay the libellants as and for a total loss, after deducting the net proceeds of the sale of the damaged wheat insured. *That the amount of the libellants' claim so estimated is the same as stated for the partial loss aforesaid.*" Thus it would appear that the pleader was under the erroneous impression that the rule of damages was the same in cases of particular average and total loss with salvage, and gives the Court to understand that an adjustment made at Boston on the basis of the sales there would produce the same result whether made

as a partial loss or as a constructive total loss. No evidence was offered to support the theory of a constructive total loss, except the statement of Mr. Johnson that if the wheat had gone forward to Lisbon *without* being reconditioned, it would have been of no value (pp. 53, 54). Any inquiry as to what would have become of the wheat if not reconditioned is wholly immaterial, for if the owners had neglected to take proper precautions for its preservation while the vessel was being repaired, the resulting loss would not have fallen upon the insurers.

McArthur on Mar. Ins., 2d Ed., p. 263.

After being reconditioned it is admitted that there was no risk of further deterioration if shipped to Lisbon (p. 56).

The question of constructive total loss was not considered by the District Court, and the only question tried and decided by that Court was whether the assured was entitled to recover for a partial loss. The case was then sent to a Commissioner to assess the damages on this basis.

Any obscurity there may be in the libel as to the precise nature of the claim was removed by the explicit definition of the claim before the Commissioner as one for a "partial loss" resulting from the sale in Boston. No further evidence was introduced before him as to the result of any supposed sale or adjustment at Lisbon, but on cross-examination of Mr. Johnson it appeared that there was no market in Lisbon for imported wheat, owing to the peculiar laws there; and that the wheat in question was imported, not for sale, but to be ground into flour in the libellants' own mills.

II.—It is entirely plain that the partial loss which the libellants are entitled to recover in case the memorandum should be held to have been deleted by the alleged collision, is the partial loss determined by the sale at Boston. It need not be said that a total loss,

actual or constructive, is a wholly different matter, and equally well defined by rules.

The rule of liability in cases of particular average (settled for over a hundred years) is to take the difference in the market price at which the goods would have sold arriving sound, and the price at which they actually sell, and *the ratio or percentage of deterioration having been thus found, it is to be applied to the value of the policy to arrive at the amount payable by the underwriters.*

McArthur on Ins. pp. 246–8.
Lewis *v.* Rucker, 2 Burr., 1167.
Johnson *v.* Shedden, 2 East., 580.
Phillips on Ins., par. 1456–60.
Parsons on Marine Ins., Vol. 2, pp. 404, 409.

For example, roughly speaking the deterioration of the wheat in this case as shown by the sales was 15½ per cent. and under the above rule the insurer was liable to pay 15½ per cent. of $20,000, the amount of the policy, namely, $3,100; whereas by applying the rule applicable only to cases of total loss with salvage, the insurer is made to pay over $6,000.

III.—The Commissioner while expressly finding that the claim was for a partial loss, and that the rule for the adjustment of a partial loss is as above stated, proceeded on a theory of his own, not advanced or contended for by the libellants, namely, that they were entitled to have the loss adjusted upon the assumed basis of what would have been the result if the wheat had gone to Lisbon and the loss had been there adjusted as a partial loss. He decided that such an adjustment would have resulted as badly for the insurers as an adjustment of a total loss with salvage (or as it is termed a salvage loss, McArthur, p. 241; 2 Arn., 974) on the basis of the sales made at Boston.

It is a settled rule that particular average must

be adjusted at the place where the voyage is terminated and the interests separated according to the actual facts then and there existing.

> "The time for ascertaining the liability of the underwriter is at the expiration of the risk."
>
> McArthur, p. 257.

> "If the insured receives the goods at an intermediate port for the sake of a better market, the average loss is to be adjusted upon the same principles as at the port of destination."
>
> Phillips on Ins., par. 1467.
>
> Macy *v.* China Ins. Co., 135 Mass., 328.

In Pitman *v.* Ins. Co. (9 Q. B. Div.), 193, the insured, instead of repairing a damaged vessel, sold it and sought to recover the estimated cost of repairs instead of the difference between its sound value and the price for which it was sold. Lindley, *J.*, observed:

> "It becomes necessary, therefore, to be careful before an hypothetical as distinguished from an actual loss is held to be the loss in respect to which the plaintiffs are entitled to indemnity."

After reviewing the authorities, he adds:

> "These cases are conclusive to show that the events which have happened, and not those which might have happened are to be regarded" (p. 197).

The rule is illustrated by cases of general average; the adjustment must be made according to the law of the place where the voyage is broken up, and the facts there existing determine the rights and liabilities of the parties.

> Lowndes on Gen. Av., p. 253.
>
> Hill *v.* Wilson, 4 Com. Pl. Div., 332.
>
> Mavro *v.* Ocean Marine Ins. Co., L. R., 9 C. P., 595.

> "There is one point in which all maritime States are agreed, namely, that the place at which a general average should be adjusted is the place of destination *or delivery of cargo.*" (Abbot, *C. J.*, in Simonds *v.* White, 2 B. & C., 805.)
>
> "Although in general the port of destination is the proper place of adjusting an average, yet when the voyage is broken up and the adventure brought to an end at some other place the average should be adjusted there, and by the law which there prevailed." (Bovil, *C. J.*, Fletcher *v.* Alexander, L. R., 3 C. P., 375.)

In the case of the National Board, &c., *v.* Melchers (45 Fed. Rep., 643) the learned Judge who tried the case applied this rule, and carried it to its utmost limit. The ship on a voyage from Hamburg to New York put into Fayal in distress. The master there broke up the voyage and the agent of the underwriters took possession of the cargo on payment of *pro rata freight*, and sent it to New York by another vessel, under a bill of lading in the name of the first master. There was no average adjustment at Fayal, but one was had at New York on the arrival of cargo, with the result that the owners of the first ship were found to be indebted, and an action was brought to recover the amount. In setting aside the adjustment the learned Judge said, after reciting the facts: "It follows that the rights of the parties are to be determined by the rules prevailing at Fayal" (at p. 647) and he expressly adopts the above mentioned statement of Lowndes as to the principle of adjustment where the voyage is broken up at an intermediate port.

In the case at bar the effect of the express agreement to determine the voyage at Boston and accept delivery of cargo there was to erase the word Lisbon from the policy and insert Boston in its place, for all the purposes of the risk, and the interests were then separated. The loss took its character from

the facts then and there existing, and they presented a case of particular average as alleged by the libellants in the statement of their claim before the Commissioner, and it should have been so treated.

Shapley *v.* Tappan, 9 Mass., 20.

IV.—The Commissioner in his report further stated that the sale was made from the necessity of the case, and for the benefit of all concerned, and that therefore the loss should be adjusted as a salvage loss. The Circuit Court of Appeals affirmed the report, but in order to sustain it was obliged to adopt the view that the adventure was practically frustrated and justifiably abandoned; and that under the special circumstances the sale of the wheat at Boston might fairly be considered to have been made from necessity, for the benefit of all concerned. This is adopting the theory of a constructive total loss, with the necessary incident of a valid abandonment; for a salvage loss is only another name for a total loss with salvage, and that form of adjustment is only proper where the facts justify a claim for an actual total loss or a constructive total loss, in pursuance of a justifiable and definitive notice of abandonment.

McArthur, p. 241.
2 Arn., 974.

But this theory is excluded by the finding of the Commissioner that "the issured had no technical right of abandonment, and his offer to abandon which was not accepted by the Underwriters does not affect the question" (p. 126).

The decision ignores the agreement to terminate the voyage at Boston; it treats the abandonment of the voyage as the result of the *vis major*, and the damage to the wheat as equivalent to a constructive total loss at Boston, thus entirely disregarding the libellants' explicit declaration that the claim was for a partial loss. But aside from this departure from the issue presented, which can-

not be sanctioned, in point of fact, there is no basis for the theory. If the libellants had a right to abandon, the ship at the same time had a right to recondition the wheat if necessary to insure its arrival at Lisbon and carry it forward for account of the underwriters. The connection of the owner with cargo after a valid abandonment is at an end. Cargo becomes the property of the insurer, the original owner has no longer a right to interfere with it, except for its preservation under an implied agency, and if he does so it necessarily amounts to a revocation of the abandonment. In this case, from beginning to end, the libellants asserted and exercised all the rights of owners, and in *that* capacity made the agreement to terminate the voyage at Boston, and they adopted all the antecedent acts of the shipowners.

3 Kent's Com., 440, 445, 446.
Columbia Ins. Co. *v.* Ashby, 4 Pet., 139.
Phillips on Ins., par. 1718.
Parsons on Marine Ins., Vo. 2, pp. 192, 193.
McArthur on Marine Ins., pp. 155–158.

V.—It is enough to say that a case of constructive total loss was not the case presented before the Commissioner for trial, and to which evidence and argument were addressed. The legal effect of a sale in such a case depends wholly upon the circumstances under which it is made. It may determine the amount of a salvage loss where the facts establish such a loss, and it does determine the percentage of liability under the policy in case of a partial loss. All sales under the law of marine insurance are made for one or the other of these objects, and there is no such thing as a "sale for the benefit of all concerned," unless that rhetorical expression is employed to merely define a sale properly made for one or the other of the above purposes. Nothing is changed by calling it a sale from necessity; it is always a case of partial or total loss according to

the facts existing before the sale (Kaltenbach *vs.* Mackenzie, 3 C. P. Div., 467, at p. 476). The essential factors in a case of constructive total loss, where such a loss is claimed, are wholly wanting in this case of partial loss, namely (1), a definitive abandonment vesting the title to the cargo in the insurer, if the abandonment was justifiable; (2), competent evidence that the percentage of damage at the port of distress was such as to justify the abandonment under the American rule, which requires that the property must be damaged to more than half its value (2 Parson's Marine Insurance, 127.) And the burden of proof is on the owner (*Id.*, 103).

We may again refer here to the agreement to break up the voyage.

> "The underwriters on cargo are willing now as they always have been that the payment of thirty-six hundred dollars ($3,600) freight on the damaged cargo of the Steamer *Liscard* by Lawrence Johnson & Co., and the acceptance and sale of said cargo by them shall be without prejudice to any of the rights or claims the shippers or owners of the cargo may have against the insurers of said cargo, and 'shall not be considered a waiver or an acceptance of an abandonment,' and shall be without prejudice to any defense that the insurers of the cargo may have under their contract of insurance."

The effect of this agreement upon the rights of the parties was (1), to substitute Boston for Lisbon; (2), to leave all the incidents of that substitution to be determined by the rules of law applicable to the situation so created; (3), to leave the law to place its own construction on the antecedents acts of the parties in dealing with the wheat, and thus determine whether the notice of abandonment had been revoked.

The intention to revoke the notice of abandonment is a conclusion of law from the admitted facts, and if there were any grounds for doubt on this point they would be removed by the explicit election

of the libellants to define their claim as one for particular average, and this election is conclusive.

Pitman *v.* Ins. Co., 9 Q. B. Div., 195.
Morean *v.* U. S. Ins. Co., 3 Wash., 256.
1 Wheat., 219.

And it was therefore only to a case of particular average that the respondents were called upon to address their proofs. Moreover, as we have seen, the Commissioner expressly finds that there was no right to abandon. The question as to whether the percentage of loss at Boston would justify an abandonment as for a constructive total loss there was not put in issue by the pleadings, nor raised by the libellants' specification of claim before the Commissioner. It is merely a theory of the Circuit Court of Appeals as to what course the libellants might have adopted, as the Court infers from the evidence of Mr. Johnson in regard to the Lisbon wheat market. But the testimony of this witness was not offered by the libellants with any reference to a claim for constructive total loss. In fact, what he says in regard to the Lisbon market was brought out on cross-examination before the Commissioner. and it is as follows:

"Q. You said you sold this cargo to the libellants. Are they merchants in Lisbon?

A. They are merchants and millers.

Q. When did you sell the cargo to them with reference to the time of shipment?

A. Shortly before; I do not remember the exact date.

Q. So that it was their cargo when shipped?

Q. It was their cargo when shipped.

Q. When you say merchants, do you mean to say that they buy and sell grain in the Lisbon market?

A. I believe they do; yes, sir. They have their own mill.

Q. Do they sell imported grain; that is, grain that is sent from this country, do you know?

A. Not as a rule. I think they do it sometimes to accommodate *other mills*, but their main business is to import and mill for themselves, and deal in native wheats, too (p. 181). * * *

Q. Is much wheat exported from this country to Lisbon?

A. We have sent over a million bushels since July 1st of this year already.

A. Is it exported there for sale in the market or for use at the mills?

A. It is ground into flour in Portugal.

Q. Is there any market in Lisbon for foreign wheat? Generally, is not nearly all wheat that is exported to Lisbon exported for the purpose of being made into flour by the consignees?

A. Yes, sir.

Q. Not merely for the purpose of being sold there by them?

A. Most of it is bought by the mills direct.

Q. It is not resold as wheat?

A. No. The laws of Portugal are very extraordinary. It appears they fix a certain number of pounds for each miller in the country of foreign wheat, and he can only mill to that pound. He cannot even enter it in the Custom House beyond that quantity " (p. 242).

VI.—Moreover it appears from the above testimony that a sale in the Lisbon market was not within the contemplation of the parties to the contract of insurance, as a measure of loss, for the wheat was destined for a flour mill, not for a market. Moreover, the insurer is never, in any case, further concerned with the state of the market than as it affords a criterion of the percentage of deterioration when there is a suitable market.

Baily, Perils of the Sea, pp. 33, 84.
McArthur on Ins., p. 250.
Phillips on Ins., par. 1457.

Again it is well settled that market value is not the only standard for determining the amount of loss for which an insurer is liable, and it is not adopted when the insured article was not destined for a market, or where there is none by which the loss could be properly ascertained. In such cases the *actual* loss of the insured is ascertained by the best means available.

Dyer *v.* Nat. S. N. Co., 14 Blatchf., 483.
Sedgwick on Damages, Sec. 243.
Lowndes on Genl. Av., 305.
Harris *v.* Panama R. R. Co., 58 N. Y., 561.
African S. S. Co. *v.* Swanzy, 2 Kay & Joh., 264.
Granger *v.* Martin, 4 Best & Smith, 9.

The case is entirely in the air unless Boston be regarded as the substituted port of delivery according to the agreement, and the libellants be held to their claim for partial loss. For, as stated above, the wheat was not intended for sale in market at Lisbon; it was bought for a flour mill, there to be ground into flour, without regard to the Lisbon market for wheat. And there is *no* evidence tending to show how much the wheat was damaged, if at all, for flour making purposes; that the damage was slight may be inferred from the price at which the wheat was sold at Boston for exportation and from the conceded fact that it could have been carried to Lisbon without risk of further deterioration.

To refer to the possible results of a sale of the damaged wheat in Lisbon, either for the purpose of determining the result of the adjustment of a partial loss there, or of inquiring whether there was a constructive total loss, is not only to refer to a standard not contemplated by the parties nor sanctioned by the law, as a measure of the loss under the circumstances of this case, but to depart from

the issue presented by the pleadings and tried before both Court and Commissioner and to substitute a hypothetical case.

The Commissioner and the Court say that the sale of the wheat was "for the benefit of all concerned," and throughout stress is laid on this idea. But it is merely another theory, not supported by any fact. The wheat was received under the agreement with the carrier and sold by the owners in the exercise of their legal right, not under any agency for the insurer, created by contract or implied by law. Moreover, this theory does not, as supposed, support the decision, but the reverse, for the very thing the respondent demands as a strict legal right, is the benefit of the sale at Boston, as fixing the measure of the respondent's liability under the claim for a partial loss. By the adjustment, this benefit is explicitly denied, contrary to the theory of a sale for the benefit of all concerned.

Fourth.

Charges under the sue and labor clause were erroneously allowed.

I.—If it should be held that the memorandum was not effaced from the policy as the result of the alleged collision, then *all* the expenses connected with reconditioning the wheat must be disallowed.

Under the memorandum clause there can in no case be an abandonment for a constructive total loss.

Therefore, as the wheat arrived at the place of delivery in specie, there would be no liability under the policy however great the percentage of deprecia-

tion; nothing but an actual total loss would give rise to a claim.

Hugg *v.* Augusta Ins. Co., 7 Howd., 595.
Phillips on Ins., Pars. 1767, 1615.
Arnould on Ins., 1013.
Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39.
Morean *vs.* United States Ins. Co., 1 Wheat., 219.
Robinson *v.* Commonwealth, 3 Sumner, 220.
2 Pars. Mar. Ins., p. 111.

The effect of the agreement between shipowner and the libellants was to terminate the voyage as of the date of the arrival of the wheat at Boston. It related back to the beginning of the negotiations for that purpose which would appear to have commenced immediately, and the libellants assumed all the expenses incurred meantime in reconditioning the wheat.

The expense of reconditioning becomes, in such a case, merely a part of the partial loss, for which, by the terms of the policy, the insurer is altogether exempt from liability.

McArthur, pp. 266, 277, 278.

II.—No part of the expense of breaking up the voyage should have been charged in the adjustment against the respondent even assuming that the policy became a general one in consequence of the collision. This would appear to be quite obvious. These charges have no relation to the sue and labor clause of the policy. The voyage was broken up not by any act or desire on the part of the respondent, but by the cargo owners, because they thought it would be for their advantage to dispose of the wheat at Boston, the appellant merely assenting without

prejudice. The nature and amount of these charges appear in the preceding statement of the case.

See 1 Arnould, pp. 245, 797, 798.
McArthur, p. 266.

Fifth.

Finally, it is submitted that the decree appealed from should be reversed.

W. W. MacFarland,
William Parkin,
Of Counsel.

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167-150

Supreme Court of the United States.

October Term, 1896.

No. 280.

THE LONDON ASSURANCE,

Respondent-Appellant,

vs.

COMPANHIA DE MOAGENS DO BARREIRO,

Libellants-Appellees.

Brief for Appellees.

JOHN F. LEWIS,

Proctor for Libellants-Appellees.

Bourse Building,

Philadelphia.

THE FACTS.

The opinion of the United States Circuit Court of Appeals, as delivered by the Hon. MARCUS W. ACHESON, concisely states the facts:

"On the 10th of December, 1890, the London Assurance insured for the libellants, $20,000 on 33,000 bushels of wheat, the property of the libellants, valued at $40,887, shipped on board of the steamship *Liscard*, in the port of New York, for a voyage "at and from New York to Lisbon, Portugal." A policy in the usual form and a short certificate, taken together, constituted the contract of insurance. The policy, by its terms, covers all losses and damages by the perils of the sea, but the certificate contains the memorandum:

"*Free of particular average unless the vessel be sunk, burned, stranded, or in collision.*"

The policy provides that the risk shall begin "upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel," and shall continue until the same shall be safely landed at the port of destination. The libellants shipped upon the *Liscard* for the same voyage, other lots of wheat, which were insured in other companies, upon the like terms and conditions. The loading of the wheat here in question and of the entire cargo on board the *Liscard* was completed, and her bills of lading were signed and delivered to the libellants by December 11th. On the next day, December 12th, the ship was unmoored for the purpose of starting on her voyage; but, on account of some trifling derangement of the engines they would not work, and therefore the ship was made fast again to the wharf. After she was remoored, on the evening of the same day, shortly after eight o'clock, the *Liscard* was run into by a scow or lighter in tow of the tug *George Carnie*.

By this collision a break was made in the bulwark or inclosed iron side of the *Liscard* above her deck. The break was a continuous one in two of the iron plates of the bulwark, was eleven feet long, and for most of its length was open a width of from one-half inch to one and a half inches. The bulwark was an important part of the vessel, essential in her design and construction, and intended to keep the water off her deck and hatches. A claim upon the tug and scow, for damages sustained by the collision, was made by the master of the *Liscard*, and the sum of $250 was paid in settlement.

After the collision, and before starting on her voyage, the vessel was surveyed and pronounced seaworthy. The *Liscard* finally left New York on December 15th. In the course of her voyage the vessel encountered very bad weather—"gales and hurricanes"—which lasted eight days, and by the excessive straining of the ship opened the seams of the deck, admitting water to the cargo; and in that way, and also by water going down the hatchways, from which the canvas coverings were swept by the storm, the wheat was injured. On December 24th the vessel put into Boston Bay in distress. At Boston the cargo was discharged into lighters for examination, and was found to be badly damaged by sea water and unfit for reshipment in its then condition. A survey made January 16, 1891, recommended that the entire cargo be sold for the benefit of all concerned. Later surveys reported the wheat to be in an improved condition, in consequence of the judicious treatment to which it had been subjected. But by the last survey, which was made on February 28, 1891, and from other evidence, it appears that none of the wheat had been restored to a first-rate condition. Even the part reported by that survey as in "fair merchantable condition" was "slightly damp" and had a "slight smell." About one-half of the wheat remained in a seriously damaged state, a great part of it beyond remedy, and some was practically worthless. On February 20th all the underwriters on the cargo (including the London Assurance) agreed in writing that the payment of $3,600 freight on the damaged

cargo, "and the acceptance and sale of said cargo," by the owners, should be "without prejudice to any of the rights or claims the shippers or owners of the cargo may have against the insurers of said cargo, and 'shall not be considered a waiver or an acceptance of an abandonment,' and shall be without prejudice to any defence that the insurers of the cargo may have under their contract of insurance." On February 27th the agents of the ship entered into an agreement with the agents of the owners of the cargo to terminate the voyage and surrender the cargo to the owners in consideration of the payment by them of $3,600 as full freight, and this agreement was carried out. Shortly thereafter the owners of the cargo sold the, greater part of the wheat at Boston, and a small portion, which could not be disposed of there, was taken to New York and sold."

The same facts precisely were found by the United States District Court, sitting in Admiralty, as will be seen by reference to the able opinion of the Hon. WILLIAM BUTLER, and his decision, and its affirmance by the Circuit Court of Appeals, were based upon the facts as found, and certainly the Supreme Court will not now question these findings, except for clear and manifest error.

The collision occurred *after* the cargo was fully loaded, and *after* the voyage had legally and actually begun. As the master of the *Liscard* says: "*We unmoored and cast adrift.* * * * *I rang up full speed from the wharf, but she wouldn't move.*". The lines were refastened, and while some very trifling derangement of the machinery was being adjusted, the collision occurred.

The policies of insurance had unquestionably attached. Their language covered the cargo, "at and from New York, bound for Lisbon," and the risk was stated to be "upon the said goods and merchandise from and immediately following the loading thereof on board of the vessel, and so shall continue and endure until the said goods shall be safely landed."

The collision break doubtless contributed to the loss. In the opinion of the District Court, it is said:

"It seems to have contributed to the loss, for, according to the proofs, some of the water entered the deck by means of the break and ran through its seams and hatches upon the cargo. True, the damage might have been as great if the break had not existed; for the sea strained the vessel from stem to stern and swept her decks with floods of water. Nevertheless, the fact remains that the break in the bulwark probably, **if not certainly,** contributed to the damage."

And the Court of Appeals say:

"There is some evidence tending to show that, during the tempestuous weather the *Liscard* encountered, some water did come on deck through the broken plates in the bulwark and reached the cargo; and at least one seafaring witness of great practical experience expresses the opinion, that a large quantity of water in a gale accompanied by high seas, would go through the break in the ship's bulwark caused by the collision."

There were six policies of insurance on the *Liscard's* wheat, and all the losses thereunder have been paid, except those of the London Assurance and of the Mannheim Company. The case now before the Court is that of the London Assurance alone, counsel having agreed that a decision of this case shall determine that against the Mannheim Company as well.

2.

After the *fact* of liability under the policy had been determined by the District Court, and the usual interlocutory decree entered, the adjustment of the loss was referred to EDWARD F. PUGH, Esq., as Commissioner. His report thereon is based on certain facts found by him from the evidence produced by both parties, and his findings were approved by the Court appointing him and by the Court of Appeals, and are entitled to the same weight as the verdict of a jury. It was shown to the Commissioner that as soon as the extent of the damage to the *Liscard's* wheat became apparent, notice of abandonment was duly given the underwriters. This notice

was never recalled, either expressly or by implication, nor was it waived or departed from in the slightest. Not only was the notice of abandonment never revoked, but also the agreement between the *Liscard* and the shipper when the voyage was broken up at Boston and part freight paid the *Liscard*, was made in consequence of the written assent thereto of the London Assurance and all the other underwriters on cargo. Their assent provided in express terms that "the acceptance and sale of said cargo by them (the shippers) shall be without prejudice to any of the rights or claims the shippers or owners of the cargo may have against the insurers of said cargo, and **shall not be considered a waiver or an acceptance of an abandonment," etc.**

Whether the voyage was properly broken up at Boston or not was passed upon by the Commissioner, and his finding that it was so broken was sustained by both the District Court and by the Court of Appeals. Boston was a port of refuge into which the *Liscard* had put with her cargo of wheat damaged with sea water, and some of it in so offensive a condition that the health authorities took charge of its disposition. It would have been absolutely unsalable in Lisbon, and the Portuguese Government, by their singular laws in reference to the importation of wheat, would not have permitted it to be landed. The voyage was in no sense terminated at Boston at the *desire* of the assured. The sale of the wheat there was the result of necessity, the parties agreeing in effect that such necessity existed. The voyage was not terminated by agreement, but rather by perils of the seas, the agreement simply recognizing the occurrence of the perils, and that the sale of the cargo should be without prejudice. In no sense was "Boston made Lisbon," and the efficient services of the libellant "in and about the defence and safeguard" of the thing insured, ought not and cannot be construed as a voluntary acceptance of the wheat short of destination, as a revocation of the notice of abandonment, nor as a waiver of their right to claim full indemnity against the loss sustained.

The opinion of the Circuit Court of Appeals says:

"The breaking up of the voyage and the sale of the cargo at the port of distress were not for the benefit of the insured solely. What was thus done was really for the advantage of all persons interested, including the underwriters. As we have already seen, the wheat was all more or less damaged. Now, it appears that the condition of affairs in Portugal with respect to the importation of wheat is peculiar, and that damaged grain is unsalable there. The finding of the Commissioner is, that the *Liscard's* wheat would have been almost valueless at Lisbon. The evidence certainly warrants the conclusion, that the loss to the appellants would have been greater had the cargo gone to Libson. We agree with the Commissioner and the Court below in the view that **the adventure was practically frustrated, and hence justifiably abandoned; and that under the circumstances the sale of the wheat at Boston may fairly be considered to have been made from necessity for the benefit of all concerned.**"

The opinion of the District Court is reported in 56 Fed., 44; and the opinion of the Circuit Court of Appeals, in 68 Fed., 247.

ARGUMENT.

Two questions are presented by the Record, first: Is the underwriter liable; and second: Has the loss been properly adjusted?

FIRST POINT.

The Evidence.—That the policies had attached at the time the collision occurred, there can be no question. The libel so alleges and the proofs conclusively establish.

It is argued, however, upon the part of the Assurance Company, that no "collision" occurred to the *Liscard*, within the terms of the policy. This however is a question of fact and the evidence disproves the contention.

FREDERICK CAMPBELL, master of the *Liscard*, was subpœnaed by the appellees, and his testimony is the result of cross-examination. The Record contains a diagram of the rent, and it will be seen therefrom that the total length of the break is a little over eleven feet, and that the opening between the fractured portion of the iron bulwarks was from one inch and a half in width down to half an inch, and extended over two of her plates. The testimony in reference to the size of the break, and the extent of the opening, is practically uncontradicted, but the master of the *Liscard* was inclined to underestimate its liability, during the great storms she encountered, to admit water upon the strained and leaky decks to the injury of the cargo below. That the cargo was actually wet, to some extent at least, by the water which came through the break, the proofs seem to establish, and the Courts below have both said was quite probable. The master's testimony shows that a claim was made by the *Liscard* for the damages sustained by the collision, and that he received in settlement the sum of $250. The damage was inflicted a little abaft the engine room on the port side, and the chief officer's log says:

"*A lighter being towed out of the dock by the tug "George Carnie," ran into us, breaking two plates in the bulwarks, bending stanchions, starting main rail, etc.*" This is a seaman's concise statement of the accident.

R. G. L. CANDAGE, who is a marine surveyor at Boston, testifies:

"*That said break was of irregular shape and eleven feet six inches long when the measurement followed the line of the break. The break was a continuous one in two of the iron plates of the bulworks.*"

From the diagram he made, it appears that beginning from the forward end, the first two feet of the break show an opening of from one-half inch to one inch;

The next three feet the break was open one and one-half inches;

The next four feet it was open from one-half to one and one-quarter inches;

The after end of the break, or one foot six inches, was open but slightly.

WILLIAM T. BERNAP[illegible] estifies, that he is Assistant Surveyor of Damaged Vess[illegible] at the Port of Philadelphia, and that he also examined the break. He substantiates the plan produced by Mr. Candage.

II.

When these facts had been proved, the respondent-appellant endeavored to show that bulwarks were not an essential part of a vessel at all! But the evidence conclusively proves that in vessels of the design and build of the *Liscard*, bulwarks are practically an extension upwards of her freeboard and necessary to her safety.

CAPTAIN CAMPBELL, though an unwilling witness, says:

"*Q.* Some vessels have only a rail around and some have bulwarks?

A. Yes, sir.

Q. Yours has bulwarks?

A. Yes, sir, **and I am glad she had.**"

His language clearly shows his estimate of the importance of bulwarks in keeping out water when his vessel was in a storm, and is doubly significant in view of the collision break.

WILLIAM T. BERNARD, the Assistant Surveyor of Damaged Vessels at the Port of Philadelphia, examined the *Liscard's* bulwarks and says:

"The collision break was in the bulwarks of the vessel, and in my opinion, as the deck of that ship is arranged, **the bulwarks form an important and essential part of the hull of the steamer.** In some cases the bulwarks are dispensed with and an open rail used, but those are cases of flush deck vessels, the entire length of whose deck stands well out of the water. * * * But in the case of a vessel like the *Liscard*, where all her houses are upon the deck and her main deck is, comparatively speaking, low, * * * the bulwarks form an important part of and protection to the ship in keeping the water off the decks."

THOMAS DUNCAN MOFFET, a master mariner, who has been following the sea thirty-five years, testifies that he knows the *Liscard* and is now in command of the steamship *Brookfield*, a vessel of the same class. He says the bulwarks:

"Are built up solidly as any other portion of the ship's side to a heighth of about four feet or four feet six above her deck. The appearance of the bulwark portion of the ship looked at from the outside is the same as any other part of the side. **The bulwarks are an important and essential part of the hull of the vessel** and are put there to keep the water off the deck and hatches. The bulwarks break the sea and protect the hatches and cargo."

He says that there are some freight steamers built without bulwarks,

"But they are flush deck steamers having a great deal more freeboard than the *Liscard* would have if her bulwarks were taken away. * * * They are now under the new construction of flush deck ships, to make them safer, giving them forecastle heads with bulwarks for additional protection. * * * They are a part of the hull of the vessel, and are built by the shipwright in constructing the hull and a part of the design of the vessel when she is modelled. * * * Vessels that do not have them are differently built and uniformly have more

freeboard. * * * My ship would not be allowed to go to sea without bulwarks unless she was given a good bit more freeboard."

WELBURN BLAND, another experienced ship master, who knows the steamship *Liscard*, and who, when called as a witness, was in command of the British steamship *Camden*, a similar vessel to the *Liscard*, testified that bulwarks,

"Are for the protection of the deck houses, crew and the hatches and hatch covers and everything about the deck. I have had several experiences showing the use and importance of bulwarks. * * * **The bulwarks break the force of the sea and keep the larger part of the water off of the deck.** * * * The iron plates are carried up above the line of the deck, enclosing the bulwarks in solidly around the ship. * * * We wouldn't be able without bulwarks to keep the tarpaulins on the hatches. * * * A class of old ships, twenty-five or thirty years old, are without bulwarks, but you see very few of them coming across the Atlantic that are without bulwarks. * * * They are flush deck ships with more freeboard than bulwark ships. * * * I should say very few of these flush deck vessels without bulwarks are built now."

JAMES PATTIE, another British shipmaster of experience, who knows the *Liscard* and is master of the steamer *Strathdee*, and has been following the sea thirteen years, says:

"I am familiar with the management at sea of bulwark steamers, and know of the purpose and use of bulwark vessels. The steamer, *Strathdee*, of which I am now in command, has bulwarks carried to a line with her TOP GALLANT FORECASTLE WHICH IS ABOUT EIGHT FEET above the deck. * * * The bulwarks are put there for the protection of the deck fittings and hatches, and they are a part of the essential construction of the ship. **The bulwarks are entirely indispensable on the class of vessel to which the "Liscard" or my present steamer belongs."**

He then proceeds to describe the construction of vessels without bulwarks, and states that they are flush deck vessels.

"The line of this upper deck would be fully as high or higher than the top of the bulwarks of the *Liscard* * * * and the usual construction of all these bulwarks to which I have referred is to carry up the first line of iron plate above the deck of the same thickness as the plate in the other portion of the ship's side. * * * The bulwarks from the outside of the ship would appear the same as any other part of the ship's side.

Q. Are bulwarks a part of the hull?

A. Certainly, they are. They are a part of the first construction of the ship."

The evidence produced by respondent to contradict this testimony is of the most flimsy character. Congdon is a Port Surveyor, and does not seem to have been at sea as a master mariner. Haag and Samuels are also Port Surveyors, and Shackford and Mumford do not appear to have ever had charge of a vessel like the *Liscard*, and it is easily perceived, from an examination of their evidence, that the vessels they refer to as being constructed without bulwarks, are those old-fashioned vessels to which the assured's witnesses refer as having unusually high freeboard.

It is not contradicted, however, that the mooring pipes in the bulwarks, and the chock-holes, on vessels like the *Liscard*, are fitted with covers and kept tightly closed at sea. All of the assured's witnesses so testify, Moffet, Bland, and Pattie. Bland says:

"That is the rule and practice on all vessels to keep the holes and openings in the bulwarks closed at sea, with the exception, of course, of the scuppers."

This uncontradicted fact demonstrates conclusively that bulwarks in vessels like the *Liscard* are really an extension of the hull above the deck line. Of course the break which the *Liscard* sustained in her bulwarks did not render her unseaworthy for the ordinary perils of the seas, but in the gales which she encountered, when for eight days her deck seams were strained and opened by heavy rolling, it certainly would let some water through upon the deck. The opening of the deck seams in consequence of the heavy laboring of the ship doubtless enabled that water, with the other which the vessel was shipping, to reach and damage the cargo.

It is preposterous for the Assurance Company to argue that no "collision" occurred because bulwarks are not an important part of a vessel. In transatlantic steamers which have high free-boards, bulwarks consist, doubtless, of open

railings, but in freight carrying vessels, such as the *Liscard*, with low free-boards, the bulwarks are essential to keep the deck free of water during heavy rolling.

That an actual collision occurred, such as the admiralty contemplates, seems too clear to question. A claim for damages was made and paid, and had payment been refused an Admiralty Court would have compelled it; and, according to the admitted facts, the collision occurred **after** the steamer had been fully loaded, **after** her bills of lading had been signed and delivered to the appellees, **after** the policy in suit had attached, and **after** every preparation to leave port had been made, her mooring lines cast off from the wharf and **after** the *Liscard*, as the master says, was "adrift" with the order given "full speed ahead."

III.

When appellees as libellants established thus indisputably that a collision had occurred, as alleged in their libel, the Assurance Company then sought immunity from liability upon the ground that the vessel was unseaworthy at the commencement of her voyage. Its answer to the libel alleges, "the vessel was unseaworthy at the commencement of the voyage, and no claim can be sustained by libellants for said loss," etc. The evidence, however, completely disproves such a defence. Seaworthiness is a question of fact, not of law, and that the *Liscard* was seaworthy, Judge BUTLER finds in express language.

He says, "the collision did not affect the vessel's seaworthiness; she was still capable of resisting the ordinary storms, and is not, therefore, blamable for starting on her voyage."

The evidence in behalf of the appellees abundantly bears out this finding. Captain Campbell had no interest upon this especial question, and swears in unmistakable terms that the injury the *Liscard* had received did not affect her seaworthiness.

"*Q.* What was the condition of the ship when she left New York?
A. **She was efficient throughout for her intended voyage.**
Q. **Was she seaworthy in every respect?**
A. **Yes, sir; well founded and well manned."**

After the collision had occurred, she was surveyed by Thomas Congdon, Lloyd's surveyor, who was subsequently called as a witness by the Assurance Company. He made a report:

"Describing these damages, and I think that the repairs should be deferred until the vessel arrived home, as they did not in any way affect her efficiency or seagoing qualities." * * * **"She was absolutely seaworthy."**

Seaworthiness is simply fitness to encounter the perils ordinarily incident to the voyage.

Justice CURTISS, in Nemours & Company *vs.* Vance, 19 How., 167, says:

"To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, staunch and strong as to be competent to resist all **ordinary action of the sea,** and to prosecute and complete the voyage without damage to the cargo under deck."

Further authority upon the subject is unnecessary, because the Assurance Company, notwithstanding its contention before the District Court that the *Liscard* was unseaworthy, expressly admitted in its defence in the Circuit Court of Appeals that she was seaworthy, and so stated in its printed brief. Upon page 3 thereof, it says: "*The ship was in every respect seaworthy when she left New York,*" and she undoubtedly was. Upon her unfortunate voyage she encountered **unusually tempestuous weather,** and but for that the collision break in her bulwarks would have been entirely unimportant.

It is not contended that all the damage to the wheat was "caused" by the collision break. No burden to prove this rests upon the assured, but it is earnestly insisted that under the evidence it cannot be argued that none of the damage was due to the break. How much was due to the break is impossible to say, and it is for this very reason that the

terms of the policy do not require the damage to be caused by the collision, and do not require the assured to prove a fact almost impossible to prove with any reasonable certainty.

It cannot be positively affirmed, however, that the collision break, concurring with the extraordinary perils the *Liscard* encountered, did not damage the wheat, but what was due to the break and what was not, would be the merest guessing—the very thing the policy is designed to avoid.

The weather which compelled her to put back to Boston seems to have been of extraordinary character. Captain CAMPBELL describes the weather briefly and to the point when he says, that it consisted of **"gales and hurricanes,"** which continued "**eight days,** * * * *the excessive straining of the ship was caused by heavy gales of wind.*" During this time great quantities of water were shipped, and, in consequence of the straining of her decks, the cargo was injured. Water was shipped over the bows, of course, and that it also came through the break in the iron bulwarks, the evidence shows, and the Courts below have found as probable. Besides, the *Liscard* had, during part of these eight days, a "port list," which would have brought the break frequently under water as she rolled in the heavy seas, and occasioned more water to pour through the rent on to the leaky decks than if she had been riding on an even keel.

Captain CAMPBELL, notwithstanding his desire to underestimate the break in the bulwark, says :

"*Q.* Did any water come on deck through the broken plates in the bulwarks which was caused by the collision, and to which you have referred ?

A. **A little must have come.**"

WILLIAM T. BERNARD, the surveyor at Philadelphia, a man of considerable experience in these matters, states, that in his opinion, "*a large quantity of water, in a gale accompanied by high seas, would go through the break in the steamer's bulwarks which I inspected, with the break opened to the extend of the survey and drawing made by Mr. Candage. Many seas which would not be high enough to go over the rail, would send*

a quantity of water through this break, and if the storm were extraordinarily severe, would overtax the capacity of the scuppers to relieve the deck. **Except in such a case the break would be unimportant."**

Part of the cargo of the *Liscard* consisted of wheat in bags stored *between decks*, and, according to the surveyor's report, this was damaged as well as the wheat in her lower hold.

As far as the facts be concerned, it need only be said that every finding of the District Court, of the Commissioner, and of the Circuit Court of Appeals, is based upon the amplest evidence and is clear beyond peradventure of mistake.

The Law as to the First Point.—It may safely be assumed that, under the certificate and policy of insurance, the appellant is liable for this loss, unless exempt by virtue of the stamped clause, "*free of particular average unless the vessel be sunk, burned, stranded or in collision.*" This clause, like almost all phrases in insurance policies, has been in use for decades, and has a certain, definite and well understood meaning, and was doubtless used by the Assurance Company, and certainly accepted by the assured with that meaning in mind. Its use regulated the rate of premium.

To exempt the company from liability, would be inserting into the policy what is known as the "*caused by*" clause, another well recognized phrase, and with respect to which the assured never contracted, and, as the proofs establish, always refused to accept.

Under the clause, as stamped on the certificate, the underwriter is responsible if the vessel be "*in collision*" during the life of the policy, irrespective of the fact whether the damage sustained by the cargo was due to the collision, or was entirely otherwise caused.

Owen on "Marine Insurance Notes and Clauses," a work which has gone through three editions, gives a complete digest

of some four or five hundred different clauses employed by underwriters. The work was published in London, the home city of the appellant, and is designed for use by underwriters. In fact, the author is himself secretary of an insurance company and of the Associated Average Adjusters of Great Britain, and more competent to speak upon the recognized meanings of insurance clauses than any legal writer. The ordinary "free of particular average clause," he gives, upon (p. 51), as follows:

"Warranted free from average, unless general, or the ship be stranded, sunk or burnt."

And says (p. 52):

"The ordinary F. P. A. clause above, is now very commonly extended to meet a case of damage caused by collision. This extension takes various forms."

He then sets out the different forms, and gives the meaning of the simple "in collision" clause as foliows:

"Here all that is required to admit a claim for particular average is the **fact of a collision** with another vessel."

Variations of the clause are given, such as:

"Unless **caused by** collision," or,

"In collision, **the collision to be of such a nature as may reasonably be supposed to have caused or led to the damage.**"

The meaning of such clauses is manifestly different from that used in the policy in suit, and he says about them:

"Here the damage must presumably have been originated by collision" (p. 52).

The nicety of his explanations, as to the meaning of the various clauses he quotes, is apparent when he explains that the meaning of the word "collision" has been itself further limited by the use of the words "with another ship," so as to exclude collision with an ice berg or any other object.

To contend, as appellant does, that the collision sustained by the *Liscard* must have caused the damage which is now sought to be recovered, would therefore be inserting into the

contract a clause not only utterly foreign to the wording used by the parties, but also one absolutely inconsistent with the well recognized and accepted meaning of the words they did use.

The phrase as stamped on the policy in suit uses the words unless the vessel be sunk, burned, stranded or "*in collision*," and if the **fact of collision** be proved, that is, if the vessel was in collision irrespective of the nature thereof, whether with a vessel, ice berg or sunken wreck, the inquiry, whether the collision may have caused the damage to her cargo or not, is entirely immaterial.

Owen, clause 163, in interpreting these very words "*or in collision*," says:

"The **bare fact of collision** is apparently to make average recoverable just as if the ship were stranded."

In the preface to the book he states that, "clauses in general use should be just as much in a stereotyped shape as is the policy itself." Appellant cannot escape the convincing reasoning of this authoritative work.

R. WINDER JOHNSON, of the firm of Lawrence Johnson & Company, who effected the insurance upon this cargo for the benefit of the appellees, testifies that there are in common use, in Philadelphia, two "free of particular average" clauses. They are substantially identical, with the exception of the use of the words "caused by." He states that these clauses are stamped upon the policies, and both are used by the Mannheim Insurance Company, and by the London Assurance, and he offered in evidence stamped copies of these clauses as commonly employed. One clause was that used in the policy in suit.

"*Free of particular average unless the vessel be stranded, sunk, burned, or in collision.*"

The other was:

"*Free of particular average unless* **caused by** *stranding, sinking, burning or collision.*"

He states that insurance agents use both of these clauses,

and that he has had policies containing one or the other of them at various times, and that in dealing with the insurance agents:

"They have offered either form, and have remarked that this (the clause used) is a better clause than the 'caused by' clause."

He further says (p. 57):

"We systematically for years have refused to do business on any but the clause on the certificates in the '*Liscard*' cases. Where companies have tendered us the 'caused by' clause, we have rejected it."

The clause he accepted, he says, is known as the "English clause."

Abundant authority supports libellants' contention. The clause in question received judicial construction over a century ago, and its meaning has been settled, and repeatedly recognized as such, by the courts of England, and by the text-book writers on both sides of the Atlantic.

It was first judicially interpreted in Cantillon *vs.* The London Assurance Company, an unreported case, cited by Sir Fletcher Norton, Attorney General, in the course of his argument of the case of Wilson, *et al.*, *vs.* Smith, 3 Burrows, p. 1553. The case was decided in 1754, when the use of the clause was in its inception.

The insurance effected was on a cargo of corn, and the policy contained the same language as that now before the Court, except that the particular average clause ended with the phrase "unless the ship be stranded." The plaintiff recovered an average loss of about eighty per cent. Lord Chief Justice RYDER, before whom the case was tried,

"Looked upon this as a condition; and that by the ship's being stranded, the insurer was let in to claim his whole partial average loss."

And the Attorney General said:

"Where the ship is stranded, the damage may happen to be such as to render it impossible to distinguish how much of it arose from the stranding of the ship, and how much of it from the perishable nature of the commodity."

This case was against the very respondent-appellant now before the Court, and the construction of the clause was almost contemporaneous with its adoption.

The case of Cantillon *vs.* the London Assurance Company is referred to by McArthur in his work on "The Contract of Marine Insurance," pp. 283–4–5. Referring to the fact of stranding, he says:

"The happening of that event effaces the warranty, and admits the risk of particular average, irrespective of percentage, upon each of the three classes of articles enumerated. In an action which was tried five years after the first introduction of the memorandum, it was contended that the words 'or the ship be stranded,' amounted only to an exception, by which the underwriters consented, in the event of the stranding of the ship, to pay for partial loss, so far as it could be proved to have resulted from the stranding. This contention was disapproved, and the underwriters were held liable for the whole of the damage sustained."

The case is also cited in Marshall on Insurance, Book I, C. 6., § 3, p. 140, where, referring to the usual form of memandum, it is said:

"This form of the memorandum was generally used, not only by private underwriters, but also by the two insurance companies, from its first introduction in 1748 till the year 1754, when a case occurred on a policy on corn, where, the ship being stranded, the insured recovered a partial loss, to the amount of about eighty per cent., Lord C. J. RYDER and a special jury considering the words, 'free from average, unless general, or the ship be stranded,' as a *condition*, and holding that by the ship's being stranded, the insured was let in to prove his whole partial loss."

And he goes on to say that in consequence of this determination, the London Assurance Company left out of the memorandum in their policies the words "or the ship be stranded," but that private underwriters continued the old form "*probably with a view to encourage merchants to insure with them,*" and it may fairly be assumed that the London Assurance Company since readopted the clause, because their customers, just as in the present case, preferred it to the "caused by" phrase.

The clause received judicial construction again, in the

case of Bowring *vs.* Emslie, in 1790, when Lord KENYON was on the Bench. This case is referred to in a foot note in 7th Durnford & East's Reports, p. 216. The action was upon a policy of insurance on fish, and the usual memorandum was in question, by which the fish was warranted free from average unless "the ship be stranded." The case was brought to recover an average loss, the plaintiff alleging that the ship had stranded, and had thereafter become so leaky that the captain and crew found it necessary to run her ashore. The underwriter contended that there was no necessity for beaching her, that the damage to the fish was occasioned by the length of time it had been on board and not by the stranding. Chief Justice KENYON, as the foot note runs :

> "Then observed, that the general mode of construing deeds to which there are exceptions, is to let the exception control the instrument as far as the words of it extend, and no further; and then upon the case being taken out of the letter of the exception, the deed operates in full force. That agreeably to this rule, it seemed to him that the stranding of the ship put the fish in the same condition as any other commodity not mentioned in the memorandum, and the underwriters were liable for the damage sustained by it, for otherwise there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing that the memorandum was intended to prevent."

In 1792, Lord KENYON, as Chief Justice of the Court of King's Bench, again passed upon the meaning of the free of particular average clause.

The case was that of Nisbett *vs.* Lushington, 4th Durnford and East's Report's, p. 783. A mob of rioters boarded a vessel in an Irish harbor and compelled her master to sell a quantity of corn at an inferior price, and, in consequence of the boarding, the ship was stranded. Referring to a part of the corn which had not been thrown overboard, but sustained damage by the stranding, Chief Justice KENYON said that he was of opinion that the case was not a general average one, because the whole adventure was not in jeopardy, but passed on to say :

"On the meaning of the memorandum I have no doubt. The articles there enumerated are of a perishable nature. As it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies to prevent disputes, and by it the underwriters expressly provide that they will not pay any average on these articles, unless it be general, or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained. Therefore, here all the damage done to the cargo thrown overboard may be ascribed to the stranding."

The language of Chief Justice KENYON in this case may possibly be said to be *dictum*, but the construction of the clause was conclusively and absolutely settled, as far as the law of England is concerned, by the case of Burnett *vs.* Kensington, 7th Durnford & East's Reports, p. 210, and this case has been followed by the text-book writers both of England and America, and never since been departed from, either in England or in any other country, as far as counsel has been able to discover.

MCARTHUR says about it, after referring to the case of Cantillon *vs.* The London Assurance Company:

"In a subsequent case it was expressly declared, after full argument and most careful consideration, that the *proviso* in question is a *condition* upon the happening of which particular average is recoverable whether occasioned by the stranding or independently of it" * * * "It appeared that the ship, in the course of her voyage, struck upon a sunken rock with such violence that she sprang a serious leak, owing to which she had to be beached. It was found that neither the ship nor the cargo had received any damage from the stranding, but that all the damage was the result of striking upon the rock."

Lowndes on Marine Insurance, §319 agrees entirely with McArthur, and says:

"Underwriters are free from all average which is not general average, and they are liable for all average in case the ship be stranded, **no matter whether the stranding caused the damage or not.**"

MARSHALL cites it with approval, and says (p. 151):

"In the following case, which is the last that has occurred on the construction of the memorandum, this question came directly before

the Court of King's Bench, and it was there, after solemn argument, and upon great consideration, determined that a stranding destroys the exception in the memorandum, and lets in the general words of the policy; and that therefore, where the ship has been stranded, the insurer is liable for any partial loss sustained by any of the articles mentioned in the memorandum, *though such loss did not arise from the stranding, but solely from another cause.*"

MARSHALL further says, referring to it:

"The only question was whether, if the ship was in fact stranded in the course of her voyage, the insurers were liable for a partial loss arising solely from the perils of the sea and not from the act of stranding. The Court, after two arguments, were of opinion in the affirmative, that the plaintiff was entitled to recover the whole partial loss. LORD KENYON said: 'The words of the policy are general, including all cases; then comes the memorandum, corn, fish, salt, fruit, flour, and feed warranted free from average, unless general or the ship be stranded. This, therefore, lets in a general average, and I do not know how to construe the words grammatically but by saying, that if the ship be stranded, that destroys the exception and lets in the general words of the policy. If a general provision be made in any instrument, and it be there said that certain things shall be excepted, unless another thing happen, if that other thing happen, it destroys the exception and gives effect to the general operation of the deed. Without entering into the reasons for introducing this exception, on the grammatical construction of the whole I have no doubt. The case of Cantillon *vs.* London Assurance Company, as stated by SIR FLETCHER NORTON, in 3 Burrows, 1553, which is better authority than Magens, is a judicial decision on the very point, by a jury of merchants, under the direction of Lord C. J. RYDER, who held that the words 'or the ship be stranded' amounted to a condition, and that, by the ship's being stranded, the insured was let in to claim his whole partial loss. This decision was acquiesced in at the time, and the insurance companies altered the form of their policies in consequence of it."

The case seems to have been tried four times before a jury, and was twice argued before the Court.

Lord Chief Justice KENYON reviews all the decisions upon the subject, and his opinion and that of his colleagues upon the Bench, all of whom delivered separate judgments, have settled the law till it be altered by statute. The case has never since been departed from, but is affirmed and recognized in the

recent authorities cited by the appellant. The Chief Justice said:

"I do not know how to construe the words grammatically, but by saying, that if the ship be stranded that *destroys the exception and lets in the general words of the policy.*"

as quoted by MARSHALL.

He goes on to say that the two opinions he previously rendered have no weight with him at all as judicial authorities, but the reasoning which then operated upon his mind, he is unable to escape the force of.

"If it had been intended that the underwriters should only be answerable for the damage that arises **in consequence** of the stranding, a small variation of expression would have removed all difficulty; they would have said: 'unless from losses arising by stranding.' But in the body of the policy they have insured against *all* losses from the causes there enumerated, which includes stranding; and then follows this memorandum, the evident meaning of which is: 'free from average unless general or unless the ship be stranded;' so that if the ship be stranded the insurers say that they will be answerable for an average loss."

A concurring opinion was delivered by Judge ASHHURST, in which he also reviews the earlier authorities, and referring to the words of the memorandum clause, says:

"The best construction that can be put on them, is that which will prevent litigation. As it is difficult to determine, when the ship has been stranded whether or not the damage to the cargo arose from the stranding, or how much of the damage was owing to that cause, it seems as if this memorandum were introduced to avoid that inquiry, and that when the ship has been stranded, the underwriters consent to ascribe the loss to that cause."

Judge GROSE also delivered a separate opinion, which is especially pertinent. He says:

"On the words no doubt can be raised; they are clear; the insurers engage that certain articles, of which fruit is one, shall be free from average except in two cases—one if it be a general average, the other if the ship be stranded; but if either of these happen, then those articles are not to be free from average. Here the ship was stranded, and then, according to the words, this case comes within one of the exceptions."

Judge GROSE further says:

"Next let us consider the reason for introducing the exception; all the articles there enumerated are of a perishable nature; and as it is difficult to ascertain whether any damage happening to them arose from the stranding or from the perishable nature of the articles, the parties seem to have agreed that there shall be no partial average unless the ship be stranded; that is, as was said by Lord KENYON in Nesbitt *vs.* Lushington, in order to avoid a difficult inquiry they agreed to consider the loss to have happened in consequence of the stranding. If we were to determine that the assured could only recover for a loss that happened by the stranding, it would introduce all that doubt and difficulty that the memorandum intended to remove. Therefore, it seems to me best to decide this case on the plain import of the words. * * * Besides, if the parties had intended that the insurers should not be liable to the average loss, unless part of the loss happened by the stranding, they would have added words to this effect: '*unless part of the loss happen by the stranding;*' and the omission of such words strongly induces me to determine strictly according to the words that are inserted in the memorandum."

Judge LAWRENCE agreed with his brethren, thus forming a unanimous Court. Abler judgments have seldom been rendered. Indeed, no cases have ever been better considered than the earlier judgments of the English Courts. The time at the disposal of Court and counsel permitted the most critical examination of authority and the most careful legal reasoning. Burnett *vs.* Kensington is a good example of this very thing. It seems to have been *six* times before the Court, and Lord KENYON was therefore moved to observe, when pronouncing his opinion: "We have had abundant opportunity of considering and reconsidering this case." Many of his lordship's judgments, like this one, constitute foundation stones upon which the structure of modern law reposes.

MCARTHUR, after citing this old and well considered authority, sums up the law (p. 285, edition of 1890) as follows:

"Where the policy contains a warranty to be free from particular average, unless the ship be stranded, and the ship is stranded at any time during the pendency of the risk, the policy is thenceforward to be read as though it had never contained the warranty."

These decisions, it is true, are those of English Courts, but appellant is an English company and cannot complain, in the absence of American authority, that its own law should be applied to the interpretation of its own contracts. By the very terms of the insurance certificate and policy, the appellant has sought to bring, as far as it could, the contract within the provisions of English law. The loss is required to be "reported in London;" the adjustment to conform to "the usage of Lloyds;" the certificate is subject to "the Revenue Laws of Great Britain;" and claim thereunder is to be stamped "after receipt in the United Kingdom." Besides, the loss is to be paid in London. Indeed, it might forcibly be argued that the contract of the parties was to be construed, according to its very terms, by the law of England, and certainly, as the Circuit Court of Appeals put it: "The words here involved are the words of *this* corporation, and it may reasonably be assumed that they were used in the sense given to them by the English law." If "The common law is reason dealing by the light of experience with human affairs," as was eloquently said in Dickerson *vs.* Colegrove, 100 U. S., 584, decisions from the highest Courts of that country which gave birth to the common law, should be authority here unless they contravene our public policy or our public statutes.

In Norrington *vs.* Wright, 115 U. S., 206, Justice GRAY said:

> "A diversity of the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts * * * is greatly to be deprecated."

II.

The authorities cited by appellant in its brief sustain rather than impair the force of libellants' contention, and appellant is strikingly inconsistent, to say the least, when it urges in bold type that the rule "*laid down in Burnett* vs. *Kensington, is wholly irrevelant in any view of the case*," and then at once strenuously endeavors to overthrow that rule. In

McDougal *vs.* Royal Exchange Association, 4 Camp., 283, a vessel touched a rock "*for a minute and a half*," and this was held a "touch and go," and not a stranding, but the *dictum* of the Court in that case, as cited by appellant, has not been approved by a single authoritative decision since and the books are full of cases giving the word "stranding" the broadest construction. Lord ELLENBOROUGH, himself, in an earlier decision, Harman *vs.* Vaux, 3 Camp., 429, said:

"If the ship touches and runs the circumstance is not to be regarded. Here she is never in a quiescent state. But if she is forced ashore, or is driven on a bank, and **remains for any time** on the ground, this is a stranding, **without reference to the degree of damage she thereby sustains.**"

Tyser on Marine Insurance, chapter 20, p. 186, treats of the memorandum. He says, § 256:

"The words 'if the ship be stranded,' are words of *condition*, and if such condition happens it destroys the exception and lets in the general words of the policy."

He cites Burnett *vs.* Kensington, and the book was published in 1894.

He gives many instances of the stringency with which the Courts have held the underwriter to the meaning of the word "stranding." For instance, taking the ground in a place where it is not in the ordinary course of navigation is a stranding, even though done intentionally.

Letchford *vs.* Oldham, 5 Q. B. D., 542.

A ship in danger of sinking in deep water was hauled on the beach, and this was held a stranding.

Barrow *vs.* Bell, 4 B. & C., 736.

Where a vessel was towed by salvors to a bank, which was not in the course of her voyage, but was a bank used for vessels to anchor at and take the ground, it was held a stranding.

De Mattos *vs.* Saunders, L. R. P., 7 C. P., 570.

McArthur says, p. 287:

"The literal meaning of the word "stranded" is cast upon the strand or shore, and is sufficiently obvious. The framers of the memorandum, in providing that the warranty to be free from particular average should not apply if the ship were stranded, had probably in view a casualty of so serious a nature as to be akin to wreck, so that any damage sustained by the ship or cargo under such circumstances might reasonably be attributed thereto, and not to the perishable nature of the subject insured. If such were the original intention, it was not adequately expressed by the words employed to give it effect; for **the stranding condition, interpreted literally, as it has been by the Courts, stands in no just relation to the damage admitted by it, but has assumed an arbitrary character.**

See other broad constructions against the underwriter.

Rayner *vs.* Godmond, 5 B. & A., 225.
Corcoran *vs.* Gurney, 1 E & B., 463.
Wells *vs.* Hopwood, 3 B. & Ad., 20.
Bishop *vs.* Pentland, 7 B & C., 219.
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In the Circuit Court of Appeals, appellant cited the case of Roux *vs.* Salvador, 1 Bingham, N. C., 526, as an authority in its favor, but it wisely omitted reference to the case here, because the case sustains to the uttermost libellants' contention and follows Burnett *vs.* Kensington in express terms.

Salted hides were shipped on board the "*Roxalene* to be carried from Valparaiso to Bordeaux. The ship was seaworthy, but met with bad weather, and sprung a leak and put into Rio de Janeiro." The hides "were in a state of incipient putrefaction, occasioned by humidity in the bottom of the vessel, and were *sold*, because had they been reshipped, the captain must have thrown them overboard before his arrival in Europe on account of their extreme putridity." The *Roxalene* was then repaired and sailed *without the hides*, and upon reaching France was stranded at the River Garonne. The facts, of course, are manifestly different from those now before the Court, and that the case is an authority for the

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appellees, will be seen from the opinion of Chief Justice TINDAL. The adventure had *terminated* as to the hides before the stranding occurred, and the policy was no longer in force.

He says that the stranding occurred,

"Not until after the hides had been landed, and the whole of the ship's adventure, and the whole of the risk of the underwriters upon the hides; that is in effect after the whole of the voyage insured had been determined and ended by the act of the insured."

He continued to say, in direct antagonism to appellant's argument:

"**The general principle laid down by Burnett *vs.* Kensington, that if the ship be stranded, the insurer is liable for any damage, though quite unconnected with the stranding, is not disputed.** The policy, after the stranding, must be construed as if no such warranty had been written on the face of it."

Appellant also cited to the Court of Appeals upon the construction of the clause in question, the case of The Thames and Mersey Marine Insurance Company *vs.* Pitts, 1 Q. B. Div. (1893), p. 476, but the case is so strong an authority against appellant, that it is here fully referred to.

The facts were, that a ship received at San Nicolas 26,910 bags of maize, and while going down the River Plata to Buenos Ayres ran aground, but got off and arrived at the latter city, and there received on board from lighters 8299 bags of more valuable maize, and then sailed for Europe.

On her voyage the maize was injured by sea water from heavy weather, and it was sought to recover particular average on the *latter* shipment, which was not on board when the stranding occurred! Judge DAY said:

"The 8299 bags were at the time of the stranding in craft off Buenos Ayres, awaiting the arrival of the ship from San Nicolas. * * * In one sense the policy is to cover *two different voyages*, one from San Nicolas to Europe, the other from Buenos Ayres to Europe. * * * And it is further to be noted that the respective lots of maize are of *different weights* and *values* and the *rates of premium are different.*"

Under such circumstances, of course, it would have been preposterous to argue, that the stranding had subjected to average, goods not on board at the time the event happened and which were insured under a different rate of premium and for a different voyage.

Judge COLLINS concurred in the opinion, and said:

"If the stranding takes place within the time contemplated by the policies, the insured can recover in respect to a particular average loss *whether the damage can be traced to the particular stranding or not.* The proposition is not only in accordance with common sense but is abundantly supported by authority."

The Judge then cites Roux *vs.* Salvador, and Burnett *vs.* Kensington, and affirms the principle for which appellees are now contending. He continues to say:

"The liability of the underwriter on goods commences with the putting of them on board, and ceases upon their being discharged and safely landed."

And referring to the rule laid down by Burnett *vs.* Kensington, the learned Judge says:

"If we consider the reason for this rule, it is obvious that it must be so. The stranding has taken place during an adventure, and the question arises (or rather used to arise) whether the particular damage is capable of being attributed to that stranding. To embark upon that inquiry necessarily involves such a long and difficult examination of the circumstances, that by the convention of the parties, as Lord KENYON put it in Nesbitt *vs.* Lushington, where a ship stranded, the underwriters agreed to ascribe the damage to the stranding, but in order to so ascribe it, the stranding must take place in the course of the adventure."

The clause before the Court was:

"Warranted free from particular average unless the ship or craft be stranded, sunk, burnt or in collision—the collision to be of such a nature as might reasonably be supposed to have caused the damage."

In view of this language used by the highest of English Courts, in the year 1893, and in a case cited by the appellant itself to the Court below, it is rather startling for it to argue

that the "latest expression of Judicial opinion in England" does not follow Burnett *vs.* Kensington.

Both of these cases cited to the Court below were freely considered, and the Circuit Court of Appeals says of them:

> "The views we have expressed are entirely harmonious with the ruling in Roux *vs.* Salvador, 1 Bing. N. C., 526, and The Thames and Mersey Marine Insurance Company *vs.* Pitts, Law Rep., 1 Q. B. Div. (1893), 476, cited by appellant * * * In each of these cases the Court recognized the binding authority of Burnett *vs.* Kensington."

But appellant seems to rest its case upon the authority of the *Glenlivet*, Law Reports, Probate Division, Court of Appeals, p. 164, affirmed in 1894, p. 48, and also reported in Aspinall's Maritime Law Cases, Vol. VII, p. 342, and upon appeal, p. 395, but the most superficial examination of it shows that the case utterly fails to sustain appellant's reasoning. The exception clause was "unless general or the ship be stranded," adding, in writing, "sunk or burnt." The last phrase is used in the past tense, and clearly implies, not a mere being "on fire," but a substantial destruction of "the ship" from combustion. The case was decided upon the special language of the policy, and the admitted dictionary meaning of the word "burnt" was "consumed by fire."

The policy was on the ship, and it appeared that a number of bunker fires had occurred, caused by the heating of the coals, an extremely common, if not an ordinary incident to the use of soft coal on transatlantic steamers. Of the first voyage the Court says: "There was no damage to the ship's structure." And the fires on the other voyages were also bunker fires and insignificant, and were put out, as they always are, by pumping water into the bunkers.

The case was submitted to the Court upon "an agreed statement of issues," and Judge BARNES in delivering the opinion of the Court below cites Burnett *vs.* Kensington and affirms it in express terms. The Judge says:

"If, therefore, the ship be stranded, the warranty against average * * * is destroyed, and in order to recover for damage, which but for the stranding would not have been recoverable, it is then not necessary to prove that the damage was occasioned by the stranding."

And again:

"If the ship is burnt, all damage * * * caused by any peril insured against, whether before, or by, or after the fire, would be recoverable, and also that these words 'sunk or burnt,' being commonly found now, as I understand, in policies on all kinds of goods, as well as in policies on ships, if the ship is burnt, average loss on goods which might otherwise be excluded, would be recoverable under the policy."

And in defining the word "burnt" he uses the language cited by appellant in its brief, that the fire must make the ship "temporarily unnavigable" or affecting her stability, but when the case was heard on appeal, though the judgment below was affirmed, the entire Court were *unanimous* in their disapproval of the definition of the Court below.

LINDLEY, J., agreed with the judgment, because he thought the question was one for a jury to pass on, and "*I think any jury would find the same.*"

SMITH, L. J., says in concluding his opinion: "*I think my brother* BARNES *put too narrow a construction upon the words 'burnt ship,'*" and,

DAVEY, L. J., said: "*I agree that* BARNES, J.'s *definition is open to criticism, but I think that it is really a question to be answered by the jury.*"

The garbled citation of the case by appellant entirely fails to do the decision justice.

The action was not brought by the cargo owner at all, but by *the ship owner*, and the question before the Court on appeal, as stated by LINDLEY, J., was:

"We have to consider whether *this ship* has been burnt within the meaning of the expression there used. * * * I take it the context shows that what is meant is that *the ship as a whole* must be stranded, sunk or burnt. * * * In the course of the argument cases have been

put of a fire on board ship extinguished before any substantial damage has been done. Can you say *the ship* is burnt? * * * What I have stated, is to my mind the clear meaning of the expression, when you take the word 'burnt' in connection with 'stranding' and 'sunk.'"

SMITH, L. J., says that it had been argued that the burning of the cabin curtains was sufficient to delete the warranty. As may be imagined, he did not agree with that reasoning. According to his view of the question, the jury should be told that:

"A partial burning may, under some circumstances, constitute a burnt ship, and may not under other circumstances, and having given that direction, you would have to ask them, has the fire been such as to burn the ship to such a condition that you would consider her a burnt ship within the ordinary meaning of the English language."

DAVEY, L. J., says:

"The question I ask myself is whether upon the evidence this ship has been burnt within the meaning of the policy,"

and he goes on to state that he cannot find anything in the nature of the fires which occurred in the bunkers,

"to think that any person would, either in the accurate use of language, or in ordinary parlance, say that in such a case as that *the ship* has been burnt."

No other conclusion could have been reached than that at which the Court arrived. The word "burnt" had acquired a definite meaning in insurance usage, and in 1886 had been the subject of a circular letter addressed to the members of the Institute of London Underwriters, and though we are not given the arguments in the Court below, this fact must have come out.

The case is an authority for nothing except the special facts to which it applied. Injury from burning can always be separated from the effects of inherent perishability, or damage by sea water, but when a vessel is stranded or in collision,

who can separate the injury caused by stranding or collision leaks from that due to sea perils or perishability?

In "Insurance Notes and Clauses," the work before cited, the author reviews the phrase, "unless the vessel be stranded, sunk or burnt," and, in referring to the latter word, cites a paragraph from the circular above alluded to:

> "Efforts have recently been made to show that the burning of ship's stores 'such as bunker coal' cancels the above warranty in a policy on a ship. * * * If the expression had been 'on fire' instead of burnt, there might have been some doubt, but even in that case we should have said, that unless part of the fabric of the ship was on fire, in the sense of itself supporting combustion, as distinguished from being scorched by the heat from some other burning material, the warranty would not be deleted."

No useful analogy can be drawn between the question was "*the ship*"—"*burnt*?" and whether she was "*in collision*." Appellant's argument to that end is entirely illogical. The consequences of a ship's being "in collision," whether to herself or to her cargo, are certainly far indeed from being always "at once perceptible." A ship is a construction of vast complication, whether built of wood or iron, and a collision may strain and weaken her beyond all possibility of ready detection. The break or outward injury may doubtless be insignificant and easily repaired, but the jar of the impact passes instantly from stem to stern, and from maintop to kelson. In fact, it is a common experience with shipbuilders to find that a blow upon the ship's stern has opened her stem, or a blow upon one side bulged out the other. With a new vessel, or with a slight blow, the results may be at once entirely apparent, but rules of legal construction must be of general application to be rules at all, and no one can say with certainty, that an old vessel, in even an admittedly insignificant collision, has not been so jarred as to make her leak in heavy weather more than she otherwise would and thereby injure her cargo, though the direct effects of the collision were entirely too slight to occasion unseaworthiness.

If analogies are drawn at all, collision will be found much more similar to stranding than to burning. Both weaken and strain, both open butts and seams or bolts and rivets, and both have a tendency to loosen the ship's general fastenings.

Appellant has cited Parson on Marine Insurance as disapproving the rule laid down in Burnett *vs.* Kensington, but in fairness to appellees it should have been stated that Parsons expressly recognizes the rule as being **well settled.** He says:

"It seems now to be settled that the phrase is to be read as if it ran thus: 'Goods to be free, etc., unless the ship be stranded,' and then this stranding is to be regarded as a *condition*, and if it takes place, the whole effect of the provision is exhausted and the insurers are liable, if there only be a stranding, for any partial loss, in the same manner as if this provision had no existence. The reason given for this rule is, that in case of stranding and partial loss, it would be impossible, or very difficult at least, to say how much of the injury to the goods arose from their own perishableness, and how much from the previous stranding. This construction is now well settled. * * * **So it is settled that if there be a stranding, the insurers are liable, although the partial loss takes place at a different time, from a different cause, and at a different place.**"

In Arnould on Marine Insurance, a book which is possibly the most authoritative work on the subject, it is said (p. 821):

"It has been decided, after much previous controversy, that these words must be read as though the clause were thus: 'Warranted free from average unless general, or unless the ship be stranded,' that is, if the ship be stranded, the underwriters agree to be responsible for any loss by sea damage on the enumerated articles, however trifling the extent or deterioration may be, just as though no warranty to be free from average had been inserted in the policy.

"The reason of this is, that, as it is very difficult to ascertain in the case of stranding, whether the damaged state of the memorandum articles arose proximately from the stranding, or from the perishable nature of the commodities themselves, the parties, in order to avoid the difficulty of this inquiry, agree to consider the loss to have happened in consequence of the stranding (which is a peril insured against) and to be solely referable thereto."

The author then states the well-known reason of the rule, and says:

"It has also been decided that the underwriters are thus liable, though the damage or deterioration in respect to which the claim is made is shown to have proceeded, not from the stranding itself, but from some other peril."

III.

The words to be construed are "in collision." The Court below has found as a fact that the *Liscard* was in collision, and appellant cannot possibly underestimate the collision which the vessel sustained, in view of the nature of the break and the positive evidence submitted. According to appellant's contention, a collision to delete the warranty must be such as to make the vessel unseaworthy, and if that is what the policy means, why did not the underwriter use these words? Many collisions which vessels sustain do not render them unfit to encounter the perils ordinarily incident to a sea voyage. One of the most recent cases of this character was that of the collision damage to the steamship *Lucerna*, an iron tank steamer, which in going down the Delaware River collided with a schooner in tow of a tug, off the Greenwich Piers, and had her stem completely turned at right angles, and the upper part above the deck line broken from the hull. Upon a survey, she was pronounced seaworthy, and directed to proceed abroad, with her cargo still in her, and make repairs after the cargo's discharge. Stipulation was allowed the *Lucerna* by the United States District Court for the Eastern District of Pennsylvania, to the extent of $25,000, to cover her damages. Many such instances might be cited.

Appellant did not attempt to argue before the District Court that no "collision," in the Admiralty sense, had been sustained by the *Liscard*. Judge BUTLER, therefore, said in his opinion: "It is not denied that a collision in the Admiralty sense of the term occurred during the risk." Before the Court of Appeals, however, appellant boldly argued, upon p. 21 of its

printed brief, that: "where a moving object on water comes in contact with a stationary object, whether a rock or a ship, it is not a collision, within any proper definition of that word." The Century Dictionary was cited by appellant, as if the admiralty collision required that the two vessels be in *motion*.

The word "collide" is derived from *com*, together, *laedere*, to strike or dash against, and by the "Century Dictionary," the word "collision" is defined as follows:

> "The act of striking or dashing together; a striking together of two bodies; the meeting and mutually striking or clashing of two or more moving bodies, **or of a moving body with a stationary one;** specifically in recent use, the dashing together of two railroad trains or of two boats or ships."

And the word collide:

> "To strike together with force; come into violent contact; * * * to strike against."

The following quotation is given from "Burton's Anatomy of Melancholy:" "*Struck or collided by a solid body.*"

The definitions given by "Webster" and by "Worcester" are almost precisely the same. The former gives from "Bentley" the following use of the word: "*The collision of flint and steel.*"

Bouvier's Law Dictionary defines the word as:

> "The act of ships or vessels striking together, **or of one vessel running against or foul of another."**

The argument of appellant, that the striking of the barge, which broke in the *Liscard's* bulwarks, was not a collision in the admiralty sense, is simply absurd. The doctrine appellant sought to establish was exploded years ago. The word applies to cases where a vessel is run foul of when entirely stationary.

The Moxey, Abbott's Adm., 73.

Indeed, a vessel is said to be injured by collision when violently *rubbed* by a third vessel.

The Pilot, 1 Biss., 164.
Sills *vs.* Brown, 9 Car. & P., 601.

In Conkling's U. S. Admiralty, p. 270, Ch. 13, it is said:

"**A collision, in the legal sense may occur while both vessels are moored.** Thus if a vessel enter a dock at high tide and be imprudently moored outside of a smaller vessel, and at ebb tide, for want of sufficient water to keep her erect, careens over and crushes the smaller vessel, this is an injury by collision for which a remedy may be sought in a Court of Admiralty."

Every admiralty lawyer well knows that the Courts are frequently called upon to take jurisdiction, and award damages to vessels injured by a collision, where one of the colliding ships has been moored to a dock, or anchored in a roadway, as motionless as a painted ship upon a painted ocean. To construe the word 'collision' as meaning that the *Liscard* must be *in motion* when she was struck, would be a violent interpolation of words into the solemn contract of the parties. If the underwriter meant a collision of that character, why did he not adopt the well-recognized limitations of the word, and say "collision with another ship, both vessels being in motion?" The clauses are numerous enough. He had plenty to choose from, but the language adopted is his, and no excuse can be offered why he should not be held strictly to express his meaning. The law throws its mantle of protection around the assured as soon as a loss has happened, because, if it did not, the necessary obscurity of all language would assist underwriters to escape their just liabilities.

Judge ACHESON says:

"Was the *Liscard* 'in collision' within the meaning of the contract of assurance? We think that she was. Undoubtedly in an admiralty sense there was a collision, notwithstanding the fact that the *Liscard* was at rest and moored when she was run into. The Granite State, 3 Wall. 310."

And it is not unreasonable in construing the policy, to give to the word "collision" its ordinary admiralty meaning. Both contracting parties thereto well knew that any litigation brought thereunder, would probably be tried by a Court of Admiralty.

McArthur, in referring to the stringency with which the language of the policy is interpreted, instances the case of Russell and Erwin Manufacturing Co. *vs.* Lodge, Shipping Gazette, Weekly Summary, June 13, 1890, where a policy contained, in addition to the memorandum, the clause:

> "'Warranted free from particular average unless stranded, sunk, burnt or in collision.' It was inferred from the omission of the word *ship*, that the parties intended the clause to have a wider application, and that the stranding of the lighter should have the same effect as the stranding of the ship, so far as concerned the admission of liability for damage to the goods in the lighter."

The lighter was being used to convey the goods between the ship and the shore.

In construing the clause in question, it should be born in mind that the American Courts have invariably adopted the rule that the policy is to be construed to prevent litigation rather than encourage it, to obviate uncertainty rather than promote it, and as a policy is a document prepared and signed by the underwriter, to construe it against him in case of ambiguity. To cite authorities to sustain such a position is almost supererogation. The Supreme Court of the United States, upon more than one occasion, has enunciated the doctrine.

In Insurance Company *vs.* Wright, 1 Wall, p. 456, the construction of a policy of marine insurance was before the Court. Justice Miller delivered the opinion and said, referring to the policy:

> "It is signed by the defendant and not by the plaintiff. All its promises are made by the defendant in its own language. All its exceptions and reservations are those of the defendant. The rule is that when in such cases, the language requires construction, it shall be taken most strongly against the party making the instrument."

The case was most ably and fully argued and the words quoted cannot, therefore, be said to be mere *dicta*.

In National Bank *vs.* Insurance Company, 95 U. S., p. 673, a policy of insurance was again before the Supreme

Court for construction. The policy was susceptible of two constructions, one which regarded the answers made in the application for insurance as constituting a warranty, and the other which regarded those allegations as a warranty only where the assured had or should have definite knowledge. Justice HARLAN said that when a policy of insurance was so framed as to leave room for construction, the Court should lean against the company using it.

"The company cannot justly complain of such a rule. Its attorneys, officers or agents prepare the policy. * * * It is its language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

When an exception contained in a policy is submitted for judicial construction, and the policy would be general but for that exception (which is the precise case now before the Court) legal reasoning, as well as common sense, require that the exception, where ambiguous or capable of two meanings, must be taken in favor of the assured. The contract is one of indemnity, and the policy being general in terms, all losses are to be paid unless brought within the terms of the exception.

Insurance Company *vs.* Wright, 1 Wall, 462.

National Bank *vs.* Insurance Company, 95 U. S., 679.

Palmer *vs.* Warren Insurance Company, 1 Story, 364, in which Judge STORY says:

"I take the rule to be clearly established as a general one, that words of exception in any instrument, are to be construed most strongly against the party for whose benefit they are introduced, and this rule has been expressly applied to words of exception in policies of insurance as well in England as in this Country. *Verba fortius accipiuntur contra proferentem.* Now, for whose benefit are these words introduced? Clearly for the benefit of the underwriters, as they are to relieve them from risks for which they would otherwise be liable under the general words of the policy. They are not, in form or substance, the words of the assured, but words of exception used by the underwriters to exempt them from liability under the general rule, which would otherwise attach upon them during the whole term for which the policy was to endure."

Judge STORY cites the following cases:

Blackett *vs.* Royal Exchange Insurance Company, 2 Cromp. & Jer., 244; Donnell *vs.* Columbia Insurance Company, 2 Sumner, 380; The Earl of Cardegan *vs.* Armitage, 2 Barn. & Cressw., 206; Bullen *vs.* Denning, 5 Barn. & Cressw., 847, 850 and 851.

And he also refers to the case of Yeaton *vs.* Fry, 5 Cranch Reports, 335, as strongly snstaining him. And in this old case, decided by the Supreme Court of the United States in 1809, a policy of marine insurance was considered by Chief Justice MARSHALL, who in referring to this rule said:

> "The words are the words of the insurer, not of the insured; and they take a particular risk out of the policy which but for the exception would be comprehended in the contract."

Further citations upon this point are unnecessary.

To hold that the damage to cargo must be "caused by" the collision, would be to construe the policy in favor of the underwriter rather than in favor of the insured, and in view of Mr. Johnson's express testimony, that both clauses were used by underwriters, and that he rejected the "caused by" clause, would be construing the policy **against the proved intention of one of the parties,** and what may fairly be assumed, the distinct understanding of the other.

SECOND POINT.

The Evidence.—The claim of the libellants, as set out in the pleadings, was for loss upon the wheat insured, for charges in general average, and for expenses incurred under the "sue and labor" clause of the policy. The libel presented the claim in the same way precisely as it was presented before the Commissioner, and though the words "partial loss" were used instead of "particular average," the former meaning strictly a total loss of part, and the latter a partial loss on the whole, the *amount* of the claim and the *way it was arrived at*, were stated in express terms to be by deducting the net proceeds of sale

from the insured value of the wheat, and by adding to the remainder, the sums claimed in general average and as special charges on cargo.

The statement of loss, upon this basis, is attached to appellant's own answer to the libel, p. 18, and was presented in the same form to the Commissioner, as embodied in his report, p. 117.

This statement of loss, made a part of the pleadings themselves, is as follows :

"Statement of loss on cargo of grain per steamship *Liscard*, from New York to Lisbon, and insured by The London Assurance Company :

There were shipped per first set of bills of lading, thirty-three thousand bushels of grain . .		$40,887 00
Insured for, in International Marine Insurance Company	$20,887 00	
The London Assurance Co. .	20,000 00	
	$40,887 00	
There were sold, thirty-two thousand, seven hundred and forty eight-sixtieth bushels of grain, net proceeds		28,554 15
LOSS		$12,332 85
Add charges, per adjustment, on first and third sets of bills of lading :		
General average on cargo .	$ 3,331 28	
Special charges on cargo .	13,405 55	
	$16,736 83	
Charge half to set bill of lading, No. 1 . .		8,368 42
		20,701 27
Proportion of $1750, special on cargo and owners, on sale of 86,102 15/100 bushels . .		664 93
Claim		21,366 20
Amount due by The London Assurance Co.		$10,451 34"

The libel expressly alleged that the cargo was so "badly damaged by the perils insured against as not to be worth the charges and duties thereon, and the cost of transportation to Lisbon, and that said transportation to its destination would have resulted in a total loss in the value of the said cargo to the libellants; that by reason of said total loss of value The London Assurance became bound to pay the libellants **as, and for a total loss, after deducting the net proceeds of the sale of the damaged wheat insured.**"

In view of this clear and distinct statement of libellants' loss and how it was made up, appellant is simply playing upon words, when it speaks about the "explicit election of libellants' to define their claim as one for particular average." The claim was never presented in any other way than as being based upon the difference between the valuation in the policy and the sum realized by the sale. The allegations to the contrary in appellant's brief, are incorrect.

The Commissioner allowed libellants' claim upon the general basis presented, but rejected certain items in the calculation, and reported (p. 132).

> "The whole cargo having been necessarily sold in Boston for the benefit of all concerned, the underwriters are liable for the difference between the sum realized at the sale and the valuation in the policies."

In view of these facts, it is grossly inaccurate to state, as appellant does in its brief, that in adjusting the loss the Commissioner "proceeded on a theory of his own, not advanced or contended for by the libellants;" that the libellant "presented a case of particular average;" and that it was "only to a case of particular average that the respondents were called upon to address their proofs."

The facts and the law fully sustain the libellants in their claim, and the Commissioner in adjusting it upon the difference between the insured value of the grain and the net proceeds thereof.

The cargo was sold in Boston after the vessel had put into that port in distress and the voyage been broken up. The appellant-respondent contended before the Commissioner

that the voyage had been improperly broken up, and that therefore the loss should not be adjusted as a salvage one, but by what is known as the "percentage rule." The Commissioner, however, in the first paragraph of his report conclusively disposes of this question of fact. He reports, in substance, that the surveys recommended that the cargo be sold at Boston for the benefit of all concerned; that to this course there was no objection on anybody's part, and that the agreement of the underwriters of February 20, 1891, assenting to the payment of freight, and reserving to the underwriters such rights as they had, evidently contemplated that the voyage would be broken up. He says:

> "That while the breaking up of the voyage and the sale of the wheat in Boston were for the benefit of the owners, they were not for their advantage alone, but for that of all interests, including those of the underwriters; that **the adventure was practically frustrated and therefore justifiably abandoned** and that these proceedings may fairly be said to have taken place 'from necessity,' as that term is used in the cases relating to the subject."

He further reports that in Portugal there is a high duty on wheat, which apparently applies to damaged as well as to sound wheat; that damaged grain is unsalable there; that wheat imported into Portugal is imported directly by millers to be ground into flour; that had the *Liscard's* cargo been reshipped to Lisbon it would not have been allowed to be landed, or if landed would have sold for little or nothing, and vastly less than was actually realized for it in Boston, and that the propriety of its sale in Boston is unquestionable. These are all QUESTIONS OF FACT which the Commissioner heard testimony upon, and has found in favor of the cargo owner. Exceptions were filed to his finding and dismissed by the District Court, and it is assumed that this Court will not go behind the Commissioner's finding unless clear mistake be shown.

Boston was a port of *refuge*—not the destination of the voyage, it was a port of necessity not of choice, and it is peculiarily ungracious in appellant to argue, that the agree-

ment of the underwriters assenting to the payment of freight to the *Liscard* at Boston, and the sale of the wheat there, was "to substitute Boston for Lisbon," and that the very efforts which libellants made to minimize the loss by reconditioning the wheat, were an evidence of ownership and a revocation of the notice of abandonment.

The Law.—The complicated "percentage rule," contended for by the appellant, does not apply to a sale of cargo in a port of distress. Indeed, some of the authorities flatly condemn the percentage rule altogether.

McARTHUR, pp. 250–251, says in reference to it:

"It is not generally understood by merchants, * * * it gives great dissatisfaction, and the system which produces such results is regarded as inequitable.

In Lowndes on Marine Insurance, §269, it is said, that where damaged goods are necessarily sold before reaching their original destination, the adjustment of the loss presents no difficulty:

"The insurer is to pay the value in the policy of that portion which is totally lost or sold short of its destination, taking credit in the latter case for the amount realized by the sale."

The evidence shows that the cargo was necessarily sold at Boston, for the benefit of all concerned, and the rule stated by Lowndes, is the rule the Commissioner has applied.

Arnould on Marine Insurance, vol. 2, p. 936, is to the same effect:

"If, however, a ship in the course of her voyage is obliged to run for a port of distress to repair, and the cargo being necessarily unloaded for that purpose, it is discovered that the whole, or a part of it, is so damaged that it would probably be wholly spoiled if reloaded and sent on, therefore to prevent further deterioration it is sold on the spot for the benefit of all concerned, in such cases the claim must be adjusted as a salvage loss; that is, the underwriter pays the difference between the prime cost or insured value of the goods, and the net proceeds of the damaged sales, that is, their market price after deducting all expenses including freight where any is due."

See also Stevens on Average, pp. 79–82.

"When a ship on her voyage puts into an intermediate port in distress, and on unloading the cargo it is discovered that some of the goods are damaged, which to prevent further depreciation are surveyed and sold on the spot—in such a case, the claim must be adjusted as a salvage loss, and all charges must be borne by the insurer."

Phillips on Insurance, vol. 2, p. 1480.

McArthur on Marine Insurance, p. 241, says:

"The claim upon the underwriters is for the difference between the insured value and the net proceeds; and the latter are computed by deducting from the gross proceeds of the property saved, all charges incurred in realizing the salvage."

In short, as has been concisely put by Stevens, p. 84,

"the merchant 'receives the net proceeds from the person who effects the sale, and the balance from the underwriter.'"

He then cites in a note an old authority from Bailey's Perils of the Sea, p. 171, that there can be no doubt whatever of the application of the rule where

"the liability of the underwriter would have been at least as great as if the goods had been forwarded and the loss stated in accordance with the rule of adjustment applicable to the case of goods arriving sea-damaged at their destination."

The present case is one, as has been said, in which the testimony conclusively shows that if the damaged wheat had been taken to Lisbon it would have been UNSALABLE and a CONSTRUCTIVE TOTAL LOSS because a total loss in value would have resulted.

Both parties to a policy of insurance are presumed to be acquainted with the laws and customs of the country to which the insured merchandise is to be sent.

Morean *vs.* The U. S. Ins. Co., 1 Wheaton, 231.

McArthur on Marine Insurance, p. 151, describes a loss as constructively total, when it is a total loss in value to the owner, and is therefore such a total loss for which the underwriter is liable.

"Where the voyage has been interrupted, * * * and the goods are lying at a place other than the place of their destination, dam-

ment of the underwriters assenting to the payment of freight to the *Liscard* at Boston, and the sale of the wheat there, was "to substitute Boston for Lisbon," and that the very efforts which libellants made to minimize the loss by reconditioning the wheat, were an evidence of ownership and a revocation of the notice of abandonment.

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"Where the voyage has been interrupted, * * * and the goods are lying at a place other than the place of their destination, dam-

aged, but in such a state that they can at some cost be brought into a condition to be forwarded to their destination, the question to be decided is, whether it is practicaliy possible to carry them on, that is, whether to do so would cost more or less than they would be worth on arrival. To determine that question, an estimate is to be made of all the extra expenses which will have to be incurred, such as the cost of discharging, warehousing, reconditioning and reshipping. * * * To these items, the cargo's proportion and general average or salvage is to be added, and the loss will be total if the aggregate exceed the estimated value of the cargo on arrival at the port of discharge."

See also, Rosetto *vs.* Gurney, 11 C. B., 176.

It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported.

Anderson *vs.* Wallis, 2 M. & S., 240.
Barker *vs.* Blakes, 9 East, 283.
Rodocanachi *vs.* Elliott, 2 Asp. Mar., L. C., (N. S.), 402.

The authorities referred to by appellant undoubtedly state that the percentage rule is applicable "*when the subject insured arrives sea-damaged at the* PORT OF DESTINATION." McArthur is to this effect, p. 246; and Arnould also, pp. 930, 936; and Lowndes, p. 173, because the goods having reached their destination partially damaged, it will not be considered inequitable (even though McArthur doubts it as aforesaid) to apply the percentage rule. As that rule is based upon the fluctuation of the market, or determinable by the market price at destination, it cannot possibly apply to a port of distress, because that port is not in the contemplation of the parties, either underwriter or shipper, when the voyage is begun, and indeed may be such a port as would be extremely difficult to sell the insured property in.

Some authorities can doubtless be cited also to show that the "percentage rule," and not the "salvage rule," is applicable where the voyage is broken up by *agreement* between the insurer and the insured, but these authorities

manifestly refer to an acceptance of the cargo short of destination for the benefit of the shipper or owner and with the same effect as if it had reached the end of its intended journey. Here there was no voluntary *acceptance* at all. The underwriter refused to act, and libellants were *compelled* to receive the goods and recondition them to escape an almost certain total loss. The evidence is conclusive in the present case, and the Commissioner has in effect so found, that the sale of the wheat at Boston was not a voluntary sale at all, but was one required by necessity, because the wheat could not be carried forward, and because if carried forward it would have greatly deteriorated and been of little or no market value. The voyage was broken up by perils of the seas, and in no sense was "Boston made Lisbon." The sale was for the benefit of all concerned, and saved the insurers from practically a total loss, and was therefore not an acceptance of the cargo by the assured voluntarily made for his own advantage.

Indeed, according to the most recent text book written upon the subject of marine insurance, this was a salvage loss. Tyser on Marine Insurance Losses, London, 1894, § 17, says:

"A salvage loss is that kind of a loss, which it is presumed would, but for certain services rendered and exertions made, have become a total loss."

And Stevens on Average, fourth edition, p. 82, says:

"In general a salvage loss of goods is, when in consequence of shipwreck or the perils of the sea, the vessel is prevented from proceeding on her voyage, and the cargo, or the part that is sold, is obliged to be sold at a place short of the destination. In such cases, though the property be not abandoned to the underwriters, the principle of abandonment is assumed."

Had the wheat been taken to Lisbon, either in its original damaged state, or after reconditioning, the evidence is uncontradicted, that by the peculiar laws of Portugal, it would not have been allowed to be discharged.

THIRD POINT.

In reference to the general average charges and the expenses incurred under the "sue and labor" clause, it should be borne in mind that when the voyage was broken up and the wheat damaged, the underwriters refused to accept an abandonment, and under the terms of the policy, the assured was forced to become their agent in saving the property from further injury, and thereby decreasing the amount of the ultimate loss. The policies of insurance contained the usual "sue and labor" clause:

"*And in case of any loss or misfortune,* **it shall be lawful and necessary** *to and for the assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandise or any part thereof without prejudice to this insurance, etc.,* * * * *to the charges whereof the said insurer will contribute, etc.*"

This clause *required* the assured to become the agent of the underwriter in suing, laboring and traveling for the recovery of the goods insured, notwithstanding the fact that he had offered to abandon to the underwriter so that the latter could do the work himself. The underwriter refused to accept such abandonment, and now, after the assured has in good faith and in the exercise of reasonable care, discretion, and skill, incurred expenses in general average and by laboring to recover the thing insured, the test of the insurer's liability, is not the absolute and strict *necessity* of the charge or expense, but whether it was *reasonable, customary, proper, usual,* in a word, simply whether it was discreet in the assured to incur the expenditure. The assured was practically an agent for the underwriter without compensation, or without any compensation other than that which comes from the mere reimbursement of the expenses he might incur.

The sums claimed under the "sue and labor" clause are apart from the general average charges, and were for the care

of the cargo, and its safe preservation after arrival at Boston in a rotting condition. Mr. Johnson testifies:

"*Q.* What would have been the condition of this grain in your opinion, if it had been sent forward to Lisbon in its damaged condition without being discharged from the steamer *Liscard* upon her arrival in Boston, and without the discharge, separation and repeated handling in the elevator, and without such other labor and expense in saving and preserving the wheat as was bestowed upon it in Boston at large expense?

A. **Ruined or totally spoiled.**

The expenses were incurred in order to avert a total loss—a greater loss to the underwriter than he is at present liable for. Mr. Johnson's evidence is uncontradicted, and is confirmed by the survey on the cargo made by the chairman of the Committee on Grain of the Boston Chamber of Commerce, by the Inspector of Grain of the same body, and by the Inspector for the Commercial Exchange of Philadelphia.

For the items of expense which were incurred in saving this cargo from further damage, and which the assured seek to recover in general average or under the sue and labor clause, the test is simply that which a careful and prudent man would do in the conduct of his own business. After the underwriter refused to act in the protection of the property, the responsibility of the assured is simply for any want upon his part of proper diligence in saving the goods, and the proper standard of diligence is "*such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property similarly situated.*"

Smyrle *vs.* Niolen, 2 Bailey, S. C. Reports, 421.

That the expenses of discharging damaged grain at a port of refuge for the separation of the injured from the ruined and the cost of reconditioning the portion capable of such treatment, and all expenses incidental thereto, are recoverable under the sue and labor cause is clear.

Lowndes on General Average, 238 *et seq.*

Meyer *vs.* Ralli, 3 Asp. Mar. L. C., 324, decided in 1876.

Lowndes on Insurance, 205.
McArthur on Insurance, 268.
Kidsen *vs.* The Empire Ins. Co., 1 C. P., 535.

As the voyage was properly broken up at Boston, it follows that the expenses incident thereto are properly recoverable.

In conclusion, it is submitted that the decree of the Court below should be affirmed.

JOHN F. LEWIS,
For Libellants-Appellees.